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Supreme Court of the United States

October Term, 1958.

No. 825.

DAVE FLEISCHER, individually and as trustee in dissolution of FLEISCHER STUDIOS, Incorporated,

Petitioner,

v.

ROBERT S. BENJAMIN and ARTHUR B. KRIM, as the "parent" of UNITED ARTISTS CORPORATION, PHILLIPS, NIZER, BENJAMIN & KRIM, A.A.P., INC., ASSOCIATED ARTISTS PRODUCTIONS, INC., and PARAMOUNT PICTURES CORPORATION,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals, Second Circuit.

GUSTAVE B. GARFIELD,
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122 East 42nd Street,
New York, N. Y.

THE REPORTER COMPANY, INC., NEW YORK 7, N. Y.—REctor 2-6978—1959

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3. For the District Court and Court of Appeals to have permitted Louis Phillips, the lead lawyer for the motion picture industry, to try the merits of the case in chief on affidavits in opposition to the motion to enjoin his participation in the case in the face of the "irrebuttable inference" rule of prejudice adopted by said Courts at his insistence as such lead counsel, is shocking to the "Equal Justice for All" principle. It would appear that the rule is enforced when great and powerful interests require its enforcement and relaxed when it is detrimental to them 22

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5. The purchase by Attorneys Krim and Benjamin through their subsidiary United Artists Corporation of a substantial block of stock constituting working control of defendant Associated Artists Productions, Inc., is a clear violation of Canon 10 of the Canons of Professional Ethics. It is champertous, contrary to public policy and this Court has power and duty to enjoin its consummation at the suit of an aggrieved party such as the plaintiff herein 31

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b.) The purchase by Attorneys Krim and Benjamin through their subsidiary, United Artists, is champertous and against public policy and the consummation of the purchase should be enjoined by this Court 33

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Supreme Court of the United States

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No.

DAVE FLEISCHER, individually and as trustee in dissolution of Fleischer Studios, Incorporated,
Petitioner,

v.

ROBERT S. BENJAMIN and ARTHUR B. KRIM, as the "parent" of United Artists Corporation, PHILLIPS, NIZER, BENJAMIN & KRIM, A.A.P., Inc., ASSOCIATED ARTISTS PRODUCTIONS, Inc., and PARAMOUNT PICTURES CORPORATION,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals, Second Circuit.

Dave Fleischer, individually and as trustee in dissolution of Fleischer Studios, Incorporated, a Florida corporation, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals, Second Circuit, dated February 20, 1959, which by a divided vote, Moore, J., dissenting, dismissed the appeal of the petitioner as non-final and unappealable two orders as follows: (1) An order of the United States District Judge Edmund L. Palmieri dated January 8, 1958, which denied the petitioner's motion for a preliminary and permanent injunction restraining Robert S. Benjamin and Arthur R. Krim, attorneys in a pending action for defendant Paramount Pictures Corporation, from acquiring directly or indirectly through their control of United Artists Corporation of which they are the "parent" under Securities & Exchange regulations, any interest in the subject mat-

ter of a lawsuit pending in the United States District Court for the Southern District of New York between petitioner as plaintiff and Paramount Pictures Corporation, *et al.*, defendants, in violation of Canon 10 of the Canons of Professional Ethics and (2) An order of United States District Judge William B. Herlands made in the same action, dated April 25, 1958, which denied the petitioner's motion for a permanent injunction restraining the law firm of Phillips, Nizer, Benjamin & Krim of which Louis Phillips, Louis Nizer, Robert S. Benjamin and Arthur R. Krim are partners, from appearing in said action as the attorneys for Paramount Pictures Corporation, *et al.*, defendants, because of their prior representation of plaintiff in substantially related matters, in violation of Canons 6 and 37 of the Canons of Ethics.

Opinions Below.

The opinion of the United States Court of Appeals is as yet unreported but it is set forth in full at pages 37-45, *infra*. No opinion was rendered by Palmieri, D. J. in denying petitioner's motion for an injunction against the violation of Canon 10, but his order with findings of fact and conclusions of law is set forth at pages 20a-23a of Appellant's (Blue) Appendix to the Court of Appeals. An opinion was rendered by Herlands, D. J., which is reported in 163 Fed. Supp. 548 and the opinion is set forth in full in the Appellant's (Yellow) Appendix to the Court of Appeals at pages 42a-82a thereof.

Jurisdiction.

The judgment of the United States Court of Appeals sought to be reviewed was entered on February 20, 1959, and the jurisdiction of this Court is invoked under 28 U. S. C. Sec. 1254(1).

The jurisdiction of the United States District Court for the Southern District of New York in the action in chief was predicated upon diversity of citizenship, the Copyright Laws of the United States (Secs. 1331, 1332, 1338 and 1400-28, U. S. C.), unfair competition, and the Anti-Trust Laws of the United States (Title 15, Sec. 15, U. S. C.).

The jurisdiction of the United States District Court on the motions for injunction was predicated upon General Rules for the Southern District of New York, Rule 5(c), which provides that "Professional misconduct shall include * * * a failure to abide by the provisions of the Canons of Ethics of the American Bar Association or the New York State Bar Association." The canons violated and the rulings of the American Bar Association thereon are set forth at pages 6-10, *infra*.

The jurisdiction of the United States Court of Appeals, Second Circuit, was predicated upon the automatic appeal provisions from an order denying an injunction contained in 28 U. S. C. Sec. 1292(1) and upon the decision of the said Court of Appeals in *Harmar Drive-In Theatre v. Warner Bros. Pictures*, 2 Cir., 1956, 239 F. 2d 555, rehearing denied 2 Cir., 1957, 241 F. 2d 937, cert. den. 355 U. S. 824 (1957), which held that no distinction existed between orders granting or denying disqualification, and that since the orders had collateral finality they were appealable "within the class of orders described in *Cohen v. Beneficial Indus. Loan Corp.*, 337 U. S. 541, 546." The *Harmar* case was reversed by the Court of Appeals, Second Circuit, by the judgment in the within action, Moore, Circuit Judge, dissenting on the ground that the orders are appealable and collaterally final.

Questions Presented.

1. Whether an order of the District Court denying a motion for an injunction restraining an attorney of record in pending litigation from acquiring an interest in said pending litigation in violation of Canon 10, Canons of Ethics, by purchasing the working control of a corporate defendant in the same litigation is an order which is appealable as of right to the United States Court of Appeals under the automatic appeal provisions contained in 28 U. S. C. Sec. 1292(1) or as an order having collateral finality under the decision of this Court in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U. S. 541, 546.

2. Whether an order of the District Court is similarly appealable to the Court of Appeals, which denied a motion for an injunction restraining a firm of attorneys who were the former attorneys for the plaintiff in the action from appearing in the action as attorneys for a defendant having a hostile interest to that of the plaintiff, where the matters in litigation are substantially related to the subject matter of the initial retainer of plaintiff (a violation of Canons 6 and 37 of the Canons of Ethics).

3. Whether the District Court had the right to pass upon the merits of the case in chief and to permit the disqualified lawyers to try the merits of the case in chief on affidavits on the motion for disqualification in the face of the "irrebuttable inference" rule of prejudice to the former client.

4. Whether the District Court erred in holding that a contract for the exploitation of cartoon characters known as "Popeye and the Thimble Theatre" negotiated by the plaintiff's former lawyer in 1932, may not be used as the basis of disqualification of said lawyer in pending litigation over the television rights of motion pictures pro-

duced under it because plaintiff assigned all right, title and interest in said motion pictures, characters and copyrights, where it clearly appears from the very contract of assignment that the plaintiff retained an "Equitable Servitude" on said motion pictures and copyrights requiring the payment to him of royalties from the commercial exploitation of the "characters" used in the motion pictures and the profits from their distribution.

5. Whether the purchase by attorneys Benjamin and Krim through their subsidiary United Artists Corporation (of which they are the "parent" under S. E. C. regulations) of a substantial block of stock of the defendant Associated Artists Productions, Inc., is champertous and in violation of Canon 10 of the Canons of Ethics and whether the plaintiff is an aggrieved party entitled to move to restrain such violation of the Canons of Ethics.

6. Whether the corporate fiction is to be disregarded where it clearly appears that the attorney is the "parent" of the corporation under S. E. C. regulations and the former client is compelled in consequence to litigate with his own former attorneys the question of his right to obtain royalties on the commercial exploitation of the cartoon characters created by him under the contract negotiated by his own former attorneys on his behalf.

The Statute Authorizing the Appeal to the United States Court of Appeals From Orders Denying an Injunction.

Section 1292, subdivision 1 of Title 28, United States Code, provides:

> Interlocutory decisions.
>
> "The courts of appeals shall have jurisdiction of appeals from: (1) interlocutory orders of the district courts of the United States * * * or of the

judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where direct review may be had in the Supreme Court."

The Canons of Professional Ethics of the American Bar Association and the General Rule of the United States District Court Adopting Them Are as Follows:

General Rules of the United States District Court for the Southern District of New York, Rule 5(c):

"(c) Professional misconduct shall include . . . a failure to abide by the provisions of the canons of ethics of the American Bar Association or of the New York State Bar Association."

Canon 6:

"* * * *Adverse influences and Conflicting interests.* It is unprofessional to represent conflicting interests, except by express consent of all concerned given after a full disclosure of the facts. Within the meaning of this canon, a lawyer represents conflicting interests when, in behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose.

The obligation to represent the client with undivided fidelity and not to divulge his secrets or confidences forbids also the subsequent acceptance of retainers or employment from others in matters adversely affecting any interest of the client with respect to which confidence has been reposed."

Canon 10, "Acquiring Interest in Litigation":

"The lawyer should not purchase any interest in the subject matter of the litigation which he is conducting."

Canon 37

"*Confidences of Client*—It is the duty of a lawyer to preserve his client's confidences. This duty outlasts the lawyers employment and extends as well

to his employees; and neither of them should accept employment which involves or may involve the disclosure or use of these confidences either for the private advantage of the lawyer or his employees or to the disadvantage of the client without his knowledge and consent, and even though there are other available sources of such information. A lawyer should not continue employment when he discovers that this obligation prevents the performance of his full duty to his former or to his new client."

The Rulings of the American Bar Association.

That the corporate fiction was to be disregarded, in arriving at a conclusion that an attorney violated Canon 10 in the purchase of shares of a corporation stock, was the opinion of the American Bar Association's Committee on Professional Ethics.

Opinion 246 (June 20, 1942) of the American Bar Association's committee is in pertinent part as follows:

> The opinion of the committee was stated by Mr. Jackson, Messrs. Phillips, Brown, Drinker, Houghton, Miller, and Brand concurring.
>
> (1) *Cannon 10* provides:
>
> "The lawyer should not purchase any interest in the subject matter of the litigation which he is conducting."
>
> The purchase of shares of stock in the corporation by the lawyer is a purchase by the lawyer of an interest in the subject matter of litigation to be instituted and conducted by the lawyer for the purpose of putting an end to the alleged appropriation by the officers and directors to their own use of income and assets of the corporation. A successful suit would better the value of the stock to the advantage of its holders and so the lawyer would profit from his purchase, as well as from compensation for his services. *Cannon 10* is clearly violated.

In opinion No. 279 the American Bar Association's committee said:

"OPINION NO. 279

(June 18, 1949)

ACQUIRING INTEREST IN LITIGATION—*Where a corporation is organized by a lawyer for the purpose of filing with and prosecuting before the Federal Communications Commission an application for a radio broadcasting license, it is unprofessional for him to contract to accept stock in the corporation as his fee for prosecuting the application and resisting another applicant's claim to a license.*

A member of the Association submits the following inquiry: Where corporation A and the owner of an existing radio station have filed an application with the Federal Communications Commission for approval of transfer of control or assignment of license of the station to corporation A, can a lawyer, in view of *Canon 10*, purchase or subscribe for stock in corporation B organized for the purpose of filing a competing or counter application pursuant to Rule 1.321 of the Rules and Regulations of the Federal Communications Commission?

And the member supplemented that question by asking whether the lawyer could buy stock in the corporation or accept stock in the corporation as payment of his fee for legal services rendered to the corporation without violating *Canon 10*?

We understand the "legal services rendered" would be in connection with organizing the corporation, prosecuting before the Federal Communications Commission the corporation's application for a radio broadcasting license and resisting the granting of a license to another applicant.

Canons 10, 26, 28
Opinions 20, 176, 246

The Opinion of the Committee was stated by Mr. Jones, Messrs. Brand, Jackson, Miller, White, Wuerthner and Drinker concurring.

Canon 10 provides:

> The lawyer should not purchase any interest in the subject matter of the litigation which he is conducting.

In construing that Canon we held in *Opinion 246* that it was improper for a lawyer to purchase stock in a corporation in order that he and his client (who owned a few shares of the corporation stock) together might hold enough stock to justify the expense of an audit in preparation of a stockholders' suit to be instituted by the lawyer. We said in that opinion:

> The purchase of shares of stock in the corporation by the lawyer is a purchase by the lawyer of an interest in the subject matter of litigation to be instituted and conducted by the lawyer for the purpose of putting an end to the alleged appropriation by the officers and directors to their own use of income and assets of the corporation. A successful suit would better the value of the stock to the advantage of its holders and so the lawyer would profit from his purchase, as well as from compensation for his services. *Canon 10* is clearly violated.

And in *Opinion 176* we declared it to be improper for a lawyer to enter into an arrangement with a layman whose business was the purchase of legacies and interests in estates, under which the lawyer would investigate the interest to be purchased and after purchase collect it by litigation or otherwise, in consideration for which the lawyer would be given a share in the interest purchased. In that opinion we said:

> This practice offends two of the Canons of Professional Ethics—*Canon 10*, which prohibits a lawyer from purchasing any interest in the subject matter of litigation which he is conducting, and *Canon 28*, proscribing the stirring up of strife and litigation. It is true that litigation may never ensue, and that it is not in course of con-

duct at the time the purchase is made, but, in the opinion of the committee this does not alter the unprofessional nature of the transaction.

The views expressed in those two opinions apply to the instant question. Just as the purchase of corporation stock in *Opinion 246* and the receiving of a share of the interest in an estate in *Opinion 176* were violations of *Canon 10*, so would that rule of ethics be infringed if in the case under consideration the lawyer were to acquire the corporation's stock either by purchase or in payment of his fee. • • •"

Drinker, in his treatise, "The Lawyer's Obligation to His Client" says at pages 99-101, *inter alia*:

"This Canon must be read in connection with Canon 28 forbidding the stirring up of litigation, as part of the age-long policy which gave rise to the statutes against champerty, maintenance, and barratry. Its purpose is to prevent lawyers from the temptation to litigate on their own account. Significantly the Canon uses the word "purchase," not "acquire." "• • • The distinction is between buying an interest in the litigation as a speculation, which Canon 10 condemns, and agreeing, in a case which the lawyer undertakes primarily in his professional capacity, to accept his compensation contingent on the outcome." (99) "A lawyer may not properly • • • *buy an interest in a claim which he represents*" (see *Matter of Flannery*, 150 App. Div. 369, 388 (1912) (Costigan's Case Book, p. 281, n. 28 • • •" (100).

"*A lawyer may not buy stock in a corporation party to litigation, or advise others to do so.*" (101).

Statement.

In 1929 Louis Phillips was an attorney working for defendant Paramount Pictures, Inc. He was permitted a private practice outside of Paramount and formed a law partnership with an attorney named Louis Nizer to exploit these outside clients. The firm name of this partnership became Phillips & Nizer (App. 88a) (Yellow Appendix).

Although the precise day when Arthur Krim and Robert S. Benjamin became partners in the law firm of Phillips & Nizer does not appear, they were certainly partners from the year 1938 onward to the present day. The firm name has since been changed from Phillips & Nizer to Phillips, Nizer, Benjamin & Krim, all four being senior partners, who represented plaintiff from 1929 to 1941.

In 1929, plaintiff Dave Fleischer, and his brother Max Fleischer and their corporation Fleischer Studios, Inc. (then a New York Corporation), became clients of the recently formed law firm of Phillips & Nizer and remained their clients continuously until the year 1941. The Fleischers and their corporations were engaged in the production of motion picture cartoons which were released by the defendant Paramount Pictures, Inc., and its affiliates operating under various corporate titles all bearing the name "Paramount" (App. p. 88-a). Among the pictures produced by the Fleischers were the famous "Popeye" series, based on the characters of "The Thimble Theatre."

In 1932 the Fleischer brothers, Dave and Max, and Fleischer Studios, Inc., became interested in creating a series of motion picture cartoons based upon the cartoon strip character "Popeye" which was created by one Segar and the copyright owner of which was King Features Syndicate, Inc. (hereafter King Features). King Features desired certain representations and warranties as to distribution to be effected through Paramount which necessi-

tated consultation with the law firm of Phillips & Nizer, who also represented Paramount, so that such representation could be made by the Fleischers (App. 30a).

The King Features Syndicate contract with the Fleischers for the creation of the "Popeye" motion picture cartoons was negotiated for the Fleischers by their attorneys, Phillips & Nizer on November 17, 1932.

In his reply affidavit, sworn to November 15, 1932, at page 16 thereof (Rec. 421) Louis Phillips says the following:

> "It may very well be true that 25 years ago, in 1932, Phillips & Nizer represented Max Fleischer in negotiating the license agreement between King Features Syndicate and the Fleischer Corporation —although I have no recollection of such representation."

One of the terms of the negotiations related to the reversion to the producer, Fleischer Studios, Inc., of the subordinate characters created by them and the other to the use to be made by the Fleischers of the motion picture cartoons after the termination of the contract in 1938. The ownership of such subordinate characters and the right to exhibit the motion pictures after termination of the contract was assured to the Fleischers. (See exhibit annexed to affidavit of Dave Fleischer Rec. 376.)

It also became necessary for the Fleischers to create a "heavy" as a foil for the heroic exploits of "Popeye" and they conceived of, and popularized and became the owners of the copyrighted character "Bluto" who is as necessary to the success of the "Popeye" cartoons as yeast is to the baking of bread. It was the counsel and advice of the law firm of Phillips & Nizer which was needed and used by the Fleischers in the making of the contract with King Features and in the exploitation of "Popeye" cartoons and characters and the Fleischers not only relied

upon such advice (App. p. 32a) but made available to Phillips & Nizer all of their papers and records from the inception of their activities in the motion picture field since 1929 and made known to them their innermost confidences, all of which said firm seeks to disclose by an examination of the plaintiff in the action (App. 31a) (Yellow Appendix).

The one most instrumental in destroying the plaintiff rights in the "Popeye" and other characters in which the plaintiff and the Fleischer Corporation (Florida), have a 50 per cent interest is none other than Louis Phillips, their former trusted attorney and advisor, who has taken a position entirely hostile to his former clients, and the right to commercially exploit the "Popeye" characters including the heavy "Bluto" is now owned by Benjamin & Krim as parent of United Artists Corporation which company purchased the controlling stock of defendant Associated Artists Productions, Inc., one of the defendants in this action, who in turn acquired it from defendant Paramount without the obligations to pay royalties to the petitioner, despite the written obligation to do so.

There is thus shown a clear conflict of interest between the obligations assumed by Phillips & Nizer as attorneys for the Fleischers and their present hostile and destructive attitude with respect to plaintiff's rights under the King Features contract. There is a direct purchase of an interest in the subject matter of the litigation which Benjamin & Krim are conducting.

The November 17, 1932, contract between King Features and Fleischer Studios, Inc., is silent on the subject of the exploitation by television of the 119 "Popeye" cartoons produced under it. There is good reason for this silence. Indeed the art of commercial exploitation by television was unknown in 1932 and in an experimental stage, and the contract occupied the same position as "talking" motion

pictures did in the days of silent movies. The television rights therefore belonged to the Fleischers (see *Autry vs. Republic Productions*, 213 F. 2d 667 (9th Cir. 1954), for the 119 "Popeye" cartoons produced under the first contract. Regardless of the question in whom title to the commercial exploitation is vested, it was sold for $2,500,000, by the joint action of Paramount and King Features.

The King Features contract of November 17, 1932, under which 119 cartoons were made, was made for the production of "Popeye" cartoon motion pictures from the period commencing August 1, 1933 and ending on July 31, 1938.

The King Features contract was extended on February 17, 1937, for five years commencing July 31, 1938.

On February 17, 1937, King Features and Fleischer Studios, Inc., entered into a renewal contract for the production by Fleischer commencing with July 31, 1938, of twelve additional "Popeye" cartoon motion pictures a year for five successive years until July 31, 1943. Nothing in the February 17, 1937, contract took away from the Fleischers their absolute rights in the characters created by them in the prior 119 "Popeye" cartoon motion pictures, such as the heavy "Bluto," nor were their rights to televise the said 119 "Popeye" cartoons previously produced, in any way interfered with, limited, whittled away or even questioned by either King Features or Paramount. However for the first time in the February 17, 1937, King Features contract, the parties attempted in paragraph FOURTH (Rec. p. 615) to define their respective television rights in the future production of "Popeye" motion picture cartoons and the reservation to Fleischer of the rights theretofore granted was assured.

A suit by Joseph Kallus v. Fleischer Studios, Inc., was commenced February 23, 1938, in which Phillips & Nizer appeared as attorneys for the Fleischers, seeking an ac-

counting for the King Features royalties, in which there was a complete disclosure of confidences covers the exact area and documents sought to be explored by Phillips, Nizer, Benjamin & Krim, as attorneys for the Paramount defendants in the present action.

On April 15, 1938, the defendant Fleischer Studios, Inc., made and served its answer through the law firm of Phillips & Nizer. All of the contracts and statements and records of Fleischer Studios, Inc., were turned over in utmost confidence to the said law firm of Phillips and Nizer to assist them in defending the action. Plaintiff in said action Joseph L. Kallus sought such information and his application for such relief was opposed in an affidavit submitted in the said court by Arthur R. Krim, one of the attorneys who was then a member of the firm of Phillips & Nizer and is now a member of the firm of Phillips, Nizer, Benjamin & Krim. Mr. Krim stated in his affidavit, *inter alia* (App. p. 34), as attorney for the Fleischers:

> "*Plaintiff* SHOULD NOT BE PERMITTED TO INQUIRE INTO CONFIDENTIAL INFORMATION INVOLVING THE DEFENDANT (FLEISCHER) AND A THIRD PARTY" (italics and capitals Mr. Krim's).
>
> The defendant (Fleischer) objects to items "3" and "4" of the proposed examination before trial. In these items plaintiff seeks to inquire into the amounts paid by defendant to King Feature Syndicate Inc. and an independent third party, pursuant to license covering the Popeye Cartoons (App. p. 34).
>
> It is in the discretion of this court to determine the impropriety of these items. The plaintiff has made convenient allegations of an oral contract pursuant to which the defendant allegedly agreed to pay the plaintiff an amount equal to the sums paid by defendant to King Features Syndicate Inc. Under these convenient allegations the plaintiff now asks this court to enforce *the disclosure of the confidential information relating to transactions* between the defendant and this third party.

> It is respectfully submitted that before the plaintiff be permitted thus to pry into confidential matters, he be obliged to show at least the semblance of a valid cause of action (record on appeal p. 29 *Kallus v. Fleischer*)" (App. p. 35).

On July 25, 1938, Louis Nizer, the very member of the firm of Phillips, Nizer, Benjamin & Krim who signed the notice of taking depositions, and the production of the confidential papers which he and his firm obtained and still have in their possession as attorneys for Fleischer Studios, Inc., swore as follows:

> "This is an action for the reasonable value of work, labor and services and defendant is entitled to know what work, labor and services were performed 5 and ½ years ago for which he claims $120,000."

The brief on appeal was written by the firm of Phillips and Nizer, Louis Nizer of Counsel who argued the appeal and who in the conclusion of the brief says (App. p. 35):

> "It is of the utmost importance for defendant to know what plaintiff did almost six years ago which plaintiff now claims is reasonably worth $120,000."

On May 24, 1941, Fleischer Studios, Incorporated, a Florida corporation having in 1938 succeeded to all of the assets of a similarly named New York Corporation, entered into an agreement with Paramount Pictures, Inc., in which agreement Dave and Max Fleischer joined as parties, by which the 119 "Popeye" motion picture cartoons as well as the copyrights thereon were sold and assigned to Paramount. However by paragraph TWENTIETH of the said agreement there was reserved to the Fleischers a 50 per cent interest in the receipts from the commercial exploitation of the "characters created for or used in any of the new cartoons, in any manner and form and by any means whatsoever now or known or devised, • • • including but not limited to commercial and publicity tieups,

dolls, books, songs, records, designs for imprinting on fabrics and other materials, accessories of whatsoever nature, radio, TELEVISION PROGRAMS, and for use in, on or with commercial articles of whatsoever nature" (see Yellow Appellant's Appendix p. 101a).

It is this clause in the May 24, 1941, contract which furnishes the crucial determining factor on this petition because by the said agreement the Fleischers and Paramount agreed to and did produce twelve "Popeye" two-reel motion picture cartoons using the same "characters" as had been previously used in the 119 cartoons produced by the Fleischers under the King Features contract of November 17, 1932, which had been negotiated for the Fleischers by Louis Phillips.

In 1956 both Paramount and King Features Syndicate sold all right, title and interest in the "Popeye" cartoons to the defendant Associated Artists Productions, Inc., for $2,500,000 and that latter corporation is exploiting said motion picture cartoons without the intention of and without paying to the plaintiff any royalties whatsoever. It is the purchase of working control of the latter corporation which petitioner sought to enjoin by the motion for an injunction.

This suit was started in the month of October, 1957, for *inter alia* an accounting of profits arising out of the commercial exploitation of the "Popeye" characters. That is but one of the items of relief sought, but the most important.

On October 29, 1957, the law firm of Phillips, Nizer, Benjamin & Krim appeared in the action on behalf of Paramount Pictures, Inc., *et al.* (Appendix 2a).

On November 6, 1957, the plaintiff moved for "a permanent injunction, enjoining and restraining the law firm of Phillips, Nizer, Benjamin & Krim and any of the at-

torneys associated with said firm or their employees, agents, servants or clerks, from directly or indirectly engaging in, participating in, or being connected with in any manner whatsoever the prosecution of the within action or associating with counsel or attorneys for any of the defendants or the prospective defendants named in said annexed affidavit upon the ground that such action constitutes a violation of the canons of professional ethics * * *" (Yellow Appellant's Appendix p. 26a).

While said motion for an injunction was pending and undetermined before Herlands, D. J., Robert S. Benjamin and Arthur B. Krim, two of the members of the law firm above mentioned, as "parent" of United Artists Corporation (a designation made by their own attorneys, Paul, Weiss, Rifkind, Wharton & Garrison, to the Securities and Exchange Commission), purchased the working stock control of the defendant Associated Artists Productions, Inc., by purchasing 700,000 out of the 1,639,000 shares of its issued shares (Appellant's Blue Appendix pp. 8a-13a).

On December 27, 1957, petitioner Dave Fleischer obtained an order to show cause to enjoin the completion of said transaction and for a permanent injunction to prevent Benjamin & Krim from purchasing an interest in the litigation because it violated Canon 10 of the Canons of Ethics. Although no affidavits were submitted in opposition to the motion for an injunction by either Robert S. Benjamin or Arthur B. Krim, the motion for an injunction was denied by Palmieri, D. J., on January 8, 1958.

As to the motion for an injunction seeking disqualification extensive affidavits touching upon the litigation in chief were interposed by Louis Phillips in which he asserted that since the Fleischers had sold and transferred all of their interest in the 119 "Popeye" cartoons to Para-

mount by the May 24, 1941, contract, the earlier agreement of November 17, 1932, which he, Louis Phillips, had drawn as the Fleischer's attorney between them and King Features Syndicate was not "substantially related" to the issues in the present litigation and his law firm was therefore not disqualified.

ARGUMENT AMPLIFYING REASONS RELIED ON FOR GRANTING THE WRIT.

1. The appeal from the denial of both injunctions was prosecuted as of right under 28 U. S. C. 1291(1) and the dismissal of the appeal was grievous error.

The basic misconception of Chief Judge Clark in his majority opinion holding that the orders were not appealable is that the basis of the motion is disqualification; "and the injunctive relief requested—that an allegedly champertous transaction be undone and the consummation of another prevented—is as collateral to the basic thrust of the motion as the incidental injunctive relief sought before Judge Herlands" (p. 38, *infra*, last sentence).

Over a century ago in *Arden v. Patterson* (New York Chancery Reports), 5, Johnsons Chancery Reports, page 44, Chancellor Kent held that the basic thrust against the enforcement of a champertous claim was by injunction saying:

> "This was a purchase by an attorney, • • • of a matter in litigation. • • • The purchase of a lawsuit by an attorney, in a case like this, is champerty in its most odious form; and it ought equally to be condemned on principles of public policy. • • •" (p. 49).

> "I shall accordingly declare * * * that a perpetual injunction issue prohibiting the defendant P.(atterson) his agents etc., or any person for his use, from proceeding at law to enforce the judgment, so recovered * * *" (pp. 53-54).

Likewise disqualification or exclusion of an attorney is merely a different terminology for an injunction restraining an attorney and his servants or employees from appearing in a case. Chief Judge Clark says, "The real and only bite to each motion is the attempt to secure the *exclusion* of the lawyers from the case; and once disqualification is obtained, all else is superfluous" (p. 39, *infra*). But surely this is nought but semantics, for *to exclude, to restrain or enjoin are synonymous* (see Rogets Thesaurus, Crowell 1922, 751, 761). More can be done by the courts for the offense of champerty than to disqualify the lawyer from appearing in the action. It can undo the transaction *ab initio* and such was the prayer for relief. As an injunction motion whether granted or denied the orders were automatically appealable under 28 U. S. C. Section 1291(1), and this would be true whether the proceeding were collateral to the main case or inclusive within it.

2. The intramural controversy among the judges of the United States Court of Appeals, Second Circuit, as to the appealability of an order denying an injunction against the appearance of a lawyer in an action involving his former client or refusing to disqualify said lawyer is hardly conducive to the orderly administration of justice and there is a crying need for finality of decision by this court to set the dispute at rest.

Certainly the public as well as the bar have a right to know with some degree of certainty whether an appeal lies as a matter of right from an order denying an injunction against the appearance of an attorney in litiga-

tion adverse to his client or seeking to enjoin the purchase of an interest in the subject matter of the litigation. In the case of *Harmar Drive-In Theatres v. Warner Bros. Pictures*, 2 Cir., 239 F. 2d 555, cert. den. 355 U. S. 824, at the insistence of Louis Phillips, the lead counsel of the motion picture industry, the Court of Appeals decided that such an order was appealable, Swan, C. J., writing for the majority and Clark, C. J., dissenting in a vigorous opinion.

As late as December 30, 1958, the Court of Appeals, Second Circuit, in the case of *MacAlister v. Guterma*, F. 2d (New York Law Journal, Feb. 13, 1959), in a unanimous decision by Kaufman, D. J., and concurred in by Swan and Moore, C. JJs., affirmed its *Harmar* decision as an effective authority.

Now less than two months later, when Louis Phillips and his partners are involved on the other side of the question, the Court of Appeals per Clark, C. J., has overruled its *Harmar* decision with Moore, C. J., dissenting, and saying (p. 43, *infra*):

> "The disqualification question is wholly collateral to the issues in the litigation and should not be mingled with matters which will be resolved only in a final judgment on the merits. Orderly and expeditious trial procedure would scarcely be achieved were a lengthy trial to be held which might be reversed on appeal were it determined that defendants' attorneys should have been disqualified. The time spent in seeking an adjudication on the merits would have been wasted because of an error unrelated to the issues in the case. This court in *Harmar Drive-In Theatre v. Warner Bros. Pictures*, 2 Cir. 1956, 239 F. 2d 555, rehearing denied 2 Cir. 1957, 241 F. 2d 937, cert. den. 355 U. S. 824 (1957), held that an order disqualifying an attorney had elements of collateral finality and hence was 'within the class of orders described in *Cohen v. Beneficial Industry Loan Corp.*, 337 U. S. 541, 546.' The ma-

> jority were of the opinion that with respect to appealability no distinction exists between orders granting disqualification and those refusing to do so' (p. 556). Accordingly the court concluded that the order was appealable."

3. For the District Court and Court of Appeals to have permitted Louis Phillips, the lead lawyer for the motion picture industry, to try the merits of the case in chief on affidavits in opposition to the motion to enjoin his participation in the case in the face of the "irrebuttable inference" rule of prejudice adopted by said courts at his insistence as such lead counsel, is shocking to the "Equal Justice for All" principle. It would appear that the rule is enforced when great and powerful interests require its enforcement and relaxed when it is detrimental to them.

In *Laskey v. Warner Bros.*, 224 F. 2d 824 (1955), cert. den. 350 U. S. 932, and *Harmar Drive-In Theatre v. Warner Bros., supra,* the Court of Appeals, Second Circuit, again at the urging of Louis Phillips, the lead counsel for the motion picture industry, adopted the "irrebuttable inference" rule in disqualification cases which establishes a presumption that confidential information, material and relevant to issues was given to the former attorney if the issues and subject matter of the former retainer or litigation is substantially related to the issues and subject matter of the present case.

This rule is defined by Swan, J., in the *Harmar* case as follows:

> "True, the Court spoke of an 'irrebutable infetence,' but we take that what was meant was that the Court should not pass upon that issue just as it will not pass upon the question whether an express trustee who buys the *trust res* for himself has in fact gotten any advantage in the sale from a trustee."

We certainly do not question the soundness of the rule, and urge its application to this case. The rule is of such salutory importance that it has been adopted by all important writers on the subject so as to become the touchstone of attorney-client relations dealing with the obligation of the former attorney not to purchase an interest in his former clients' cause or to adopt a position in a lawsuit as counsel for a hostile interest opposed to that of the former client. The sanctions for the violation of Canons 6 and 37 of the Canons of Ethics are severe. (See notes—Sanctions for Attorney's Representation of Conflicting Interests—Columbia Law Review, Nov., 1957, Vol. 57, No. 7, p. 995—Note, Disqualification of Attorneys Representing Interests Adverse to Former Clients, 64 Yale L. J. 917 [1955]. Kaplan, Forbidden Retainers, 31 N. Y. U. L. Rev. 914—Kaufman, 70 Harvard Law Review 657 [1957].)

In the instant case not only was the "irrebutable inference" rule disregarded, but the attorney Louis Phillips, chiefly responsible for its adoption, was permitted to try the case on the merits upon a false issue of fact and law concerning the reserved royalty rights of the Fleischers in and to the motion pictures which had been assigned to Paramount but subject to the obligation to pay the Fleischers royalties in the future and to account for the proceeds from their commercial exploitation.

The practice of the District Courts of trying the merits of litigation in chief on the hearing with respect to collateral issues was condemned by this Court in *Smith v. Sperling*, 354 U. S. 91, where Douglas, J., writing for the majority, said:

> "To stop and try the charges of wrongdoing is to delve into the merits. That does not seem to us to be the proper course. It is a time consuming, wasteful exertion of energy on a preliminary issue in a case. The instant case is a good illustration,

for it has been over eight years in the courts on this question of jurisdiction. * * * Obviously federal law would govern the preliminary trial on the issues of wrongdoing for that matter goes to the question of federal jurisdiction. Yet should the District Court decide those issues in favor of the stockholder, a second trial on the merits will require that the same issues be tried out according to the set rules supplied by local law.

"It seems to us that the proper course is not to try out the issues presented by the charges of wrongdoing but to determine the issues of antagonism on the face of the pleadings and by the nature of the controversy."

The "irrebuttable inference" rule required that the inquiry be stopped once the relationship on the substantially related issue was disclosed and it was grievous error to permit Louis Phillips to explore the litigation on the merits. He thus defeats disqualification by defeating the action on the merits, and is using his victory so obtained to obtain a dismissal of the action in the District Court.

4. Judge Herland's decision which denies to the Fleischers an equitable servitude in the copyrighted motion pictures cartoons directed, composed and produced by them, despite the reservation of royalties to them, flies in the face of the unanimous decisions of the State of New York under whose laws the contract is to be interpreted and of the United States Court of Appeals for the Second and Sixth Circuits and if upheld destroys the implied rights of every producer, director, author or composer to have his copyrighted product worked for his benefit.

The crucial King Features contract of November 17, 1932, which defined the residual rights of the Fleischers in the "Popeye" characters and cartoons, 119 in number, concededly drawn by Louis Phillips as attorney for the

Fleischers, has been held to be unrelated by Herlands, J. This decision on the merits was predicated upon the false affidavit of Louis Phillips, who alone asserts that King Features contract has no relation to the subsequent sale of the television rights by King Features and Paramount for $2,500,000. Such false assertion appearing in Mr. Phillips' affidavit at page 22, folios 64-66, of the Appellees' Appendix, was adopted in its entirety by Judge Herlands in the face of the clear reservation of the residual rights to the Fleischers of a 50 per cent interest in the commercial exploitation by television of the characters created for use or used in the new cartoons.

In re Waterson, Berlin & Snyder Co. v. Irving Trust Co., 48 Fed. 2d 704, the United States Circuit Court, Second Circuit, said per Augustus N. Hand, J.:

> "Courts of the United States have enforced rights resembling an equitable servitude binding on a third party who has acquired personal property from one who is under a contract to use it for a particular purpose or in a particular way" (p. 708).

Although the contract of May 24, 1941, is personal to the parties and non-assignable without the consent of the petitioner Dave Fleischer who is a party to it, even if we were to assume *arguendo* that the contract was assignable without his consent, his right to enforce the royalty provision as against the assignee is absolute. Continuing, the Court of Appeals said in the *Waterson* case:

> "But it is a different matter to say that the sale of the copyrights should be free from all equities on behalf of the composers. • • •"
>
> "It is true that the royalties on the songs are definitely provided to be paid only in the event of publication by Waterson, Berlin & Snyder Company. • • • It seems to us equally unreasonable to suppose that the trustee may sell them free from all rights of the composers and thus deprive the latter of the only means of fixing the royalties which they

have been promised. In our opinion, while the copyright may be sold by the trustee, they should be sold subject to the right of the composers to have them worked in their behalf and to be paid royalties according to the terms of the contracts" (p. 710).

The Equitable Servitude doctrine relied upon by Circuit Court of Appeals Judge Augustus Hand in the *Waterson* case was first announced by Jessel M. R. in 1881 in the case of *Werdeman v. Societe Generale D'Electricite*, 19 Ch. Div. 246; 252. The doctrine of Equitable Servitude and the *Waterson* case was approved by the United States Court of Appeals, Sixth Circuit, Hicks, J., in *Kenyon v. Automatic Instrument Co.*, 160 F. 2d 878, 884. Said Judge Hicks:

> "'How * * * it can be argued in a Court of Equity that an assign can take a patent with notice of that arrangement and keep all the profits himself, I am at a loss to understand.' The quotation from Jessel M. R. embodies the crux of this case."

The *Waterson* case was approved by the unanimous U. S. Court of Appeals, Second Circuit, in *Standard Oil Co. v. Clark*, 163 F. 2d 930, with Clark, C. J. (who voted to dismiss the appeal in the within action), writing the opinion of the Court sustaining the principle of Equitable Servitude.

The contracts between the Fleischers and Paramount all provide that they are personal and non-assignable and to be interpreted according to the laws of the State of New York and the New York case law has adopted the principle of Equitable Servitude embodied in the *Waterson* decision in the case of *Broadcast Music Co. v. Taylor*, 10 Misc. 2nd 21, where Pecora, J., said:

> "It was a breach of its contract and a breach of trust as well for Marks to attempt to cut off the rights of the composer."

It has been held by the U. S. District Court for the Southern District of New York *In re McBride*, 132 F. 285 (1904), that where as in the instant case the contract is non-assignable without the consent of the author, composer or creator of the literary material that neither the copyright nor its material may be transferred without his consent to a stranger.

The doctrine of Equitable Servitude, first pronounced by Jessel M. R. has over the greater part of the Twentieth Century had the almost unanimous approval of scholars and textbook writers.

The doctrine of "Equitable Servitudes on Chattels" is discussed in an article by the late Professor Chafee in Vol. XLI, Harvard Law Review, June, 1928, pp. 945, 954, where it will be found that he quotes with approval the decision of Jessel M. R. in the *Werderman* case. The latter case is discussed with approval in a Note on Equitable Servitudes on Chattels 32, Har. Law Review, p. 278, in a note entitled Copyrights-Restitution on the Bankruptcy of the Publisher (*In re Waterson, Berlin & Snyder Co.*), Illinois Law Review, 25:204-206 (Chicago, June, 1930), and in an article, Equitable Servitudes, Creation and Kinds—Obligation to Work Copyrights and Pay Royalties, Harvard Law Review, 45:586-587 (1945).

In the Note to 31 Columbia Law Review, page 1335 (1931) at 1344, titled Equitable Liens, it is said by way of conclusion:

> "Two explanations of the *Waterson* decision suggest themselves. It may be that the court in recognizing that Equitable Servitudes on chattels may exist, imposes a lien to avoid the difficulty of framing an injunction which would be adequate to enforce the servitude if at a later date the purchaser of the copyright fails to abide by it. Or it may be that by using the respectable device of a lien to give the composers rights in the property itself, the court

> is thus seeking to cloak its acceptance of novel doctrine. In either case this use of the equitable lien if not unprecedented, is extraordinary and albeit in a narrower sphere, indicates a principle of relief hardly less important than that of *Lumley v. Wagner*."

Where a decision of a United States District Court which if permitted to stand will destroy the rights of thousands of authors, writers, directors and producers to receive royalties on their work product which they have assigned to motion picture companies in the hope of receiving such royalties and such decision is contrary to the unanimously accepted body of case law throughout the country and the State of New York, whose law is to be used as a basis of decision, it is submitted that this Court should pass upon the question to lend finality of decision in this important field of copyright law.

The extent to which Judge Herlands' decision destroys the rights of the Fleischers and with it the rights of all authors, composers, producers and directors of motion pictures who have been unfortunate enough to transfer their copyrighted works to motion picture corporations in exchange for the right to obtain royalties is illustrated by his decision where he says in pertinent part (Appellant's Yellow Appendix, pp. 60a-63a):

> "The May 24, 1941 agreement transferred to Paramount the Fleischers' property interest in all of the movie cartoons that they had owned or made prior to the date of the contract. As to 'new cartoons,' the Fleischers had a fifty per cent net profit participation as defined in the contract. This profit-sharing provision referred to the 'new cartoons' and the word 'characters,' so as to encompass the use in such new cartoons of both old characters (i. e., those characters that had been used prior to May 24, 1941) and newly created characters. The distinction is between 'cartoons' and 'characters,' the cartoon being an animated portrayal

of one or more characters. The May 24, 1941 contract further provided that, where a character is used in a new cartoon and is also exploited by use other than by movies (such as use on television, in advertising, dolls, etc.) the Fleischers would have a share of the profits resulting from such exploitation.

"Under the *1937* license agreement between the Fleischers and King Features Syndicate, Inc., the Fleischers, by express prohibition and exclusion, did not have the right to use on television, the movie cartoons that they had made or would make under and pursuant to the *1937* license agreement. However, plaintiff now contends that (regardless of the 1937 agreement just mentioned) the Fleischers had the right—based on the 1932 license agreement—to use on television both the characters and the movie cartoons that they had used and produced during the years 1932 through 1937, when they were operating under the *1932* license agreement. The 1932 license agreement did not refer to the subject of television; hence, plaintiff now argues that there was no restriction under the *1932* license agreement on the Fleischers' use of characters or cartoons on television.

"The next branch of plaintiff's argument concerns the scope or coverage of the word 'exploitation,' as used in the 1941 contract. Plaintiff argues that, when Paramount used on television the old movie cartoons (i. e., those produced by the Fleischers during the period from 1932 through 1937) *and* such old movie cartoons contained a 'character' that was also used in one of the new cartoons made after May 24, 1941, the use of such old movie cartoons after May 24, 1941 constituted 'exploitation' of a character within the meaning of the 1941 contract. Plaintiff then concludes that the Fleischers are entitled to profit-share in the use of such old movie cartoons.

"The fallacy of plaintiff's argument is that it blandly overlooks the explicit assignment by the Fleischers to Paramount in the 1941 agreement of all of their interest in and to the old movie cartoons.

Having expressly divested themselves of all interest in the old movie cartoons, the Fleischers cannot now use the 'exploitation' provision as a device to retain a profit interest in that which they completely surrendered to Paramount.

"Mr. Phillips had nothing to do, as Fleischers' attorney, with either the 1937 license agreement with King Features Syndicate, Inc. or the 1941 contract with Paramount. Therefore, in order to tie in Mr. Phillips for purposes of the pending cross-motion, plaintiff resorts to *the 1932 license agreement between the Fleischers and King Features Syndicate, Inc., in connection with which Mr. Phillips did represent the Fleischers.* Following up the latter point, plaintiff then attempts to show that the 1932 license agreement is substantially related to the issues of the present case. The threads of plaintiff's argument, so far as they may be woven into a coherent thesis, are: the 1932 license agreement contained no restriction, express or implied, as to the Fleischers' use on television of characters or cartoons, and that—contrary to Mr. Phillips' present contention—the 1932 license agreement should be interpreted as permitting the Fleischers to use on television the characters and cartoons made during the years 1932 through 1937. The subsequent 1937 license agreement, as noted, while prohibiting the Fleischers' television use of cartoons made under the 1937 license agreement, did not forbid the Fleischers' television use of characters and cartoons made prior to the 1937 license agreement. Since Mr. Phillips represented the Fleischers in the 1932 license agreement, and since Mr. Phillips now takes a position contrary to that of his erst-while clients vis-a-vis the 1932 agreement—an agreement that he negotiated professionally for the Fleischers—plaintiff concludes that Mr. Phillips should be disqualified.

"The fallacy of this argument is that the Fleischers no longer have a property interest in the old cartoons produced between 1932 and 1937, because they expressly transferred whatever rights they had in such old cartoons to Paramount by the 1941 contract. If arguendo plaintiff has any tele-

vision rights in the new cartoons or characters, such rights could not be based on the 1932 agreement, in view of the 1941 transfer. Consequently, the open issue for litigation involves the interpretation of the 1941 contract. As will be pointed out in detail below in this opinion, plaintiff himself expressly stated that the vital issue herein is the interpretation of the 1941 contract. The interpretation of the 1932 license agreement, therefore, does not have any relevancy and materiality to any current issue, for howsoever it may be interpreted as defining the rights of the Fleischers, those rights were fully and completely transferred to Paramount. *The Court concludes that Mr. Phillips' contract with the 1932 agreement may properly be disregarded for purposes of the present motion, because that agreement has no substantial relationship to any current issue.*

"With respect to the issues raised under the first cause of action, the Court clearly concludes that there is no basis to disqualify Mr. Phillips and his partners." (Italics supplied.)

5. The purchase by Attorneys Krim and Benjamin through their subsidiary United Artists Corporation of a substantial block of stock constituting working control of defendant Associated Artists Productions, Inc., is a clear violation of Canon 10 of the Canons of Professional Ethics. It is champertous, contrary to public policy and this Court has power and duty to enjoin its consummation at the suit of an aggrieved party such as the plaintiff herein.

a.) The Court should pierce the corporate veil to determine the real identity of the purchasers as well as the sellers.

In the case of *Harmar Drive-in Theatre, Inc., v. Warner Bros.*, 239 F. 2d 555, the attorney against whom disqualification was sought, claimed that since the corporate

identity of his clients was different from those represented by his former partner, disqualification should be denied. This Court ruled in both the majority opinion of Swan, J., and the dissenting opinion of Clark, C. J., that the corporate veil must be pierced to determine the beneficial ownership and actual control.

Swan, J., writing the majority opinion said:

> "Moreover, if the two plaintiffs at bar were identical in interest with the three just mentioned, we cannot believe that it makes any difference that they are separate corporations. If the beneficial ownership of all the corporations is the same and the disqualification, imputed to the innocent partner, lasts after the dissolution of his partnership with Isacson, there is just as much reason to suppose that defendants at bar will suffer in the defense of the instant actions as in the defense of the other three actions. Therefore as to 'Colonial', which is completely controlled by the Sterns, Malkan is disqualified. As to 'Harmar', the situation is not quite so clear. The Sterns owned only half the stock but it was they who engaged Malkan. Under these circumstances we think that the situation called on him to show that the Sterns did not control 'Harmar' and this he did not do. We hold him disqualified also in the 'Harmar' action."

Clark, C. J. (dissenting), said:

> "Defense counsel very shrewdly suggested that here all we had to do to find identity was to look through the corporate control to the real ownership. If that were all, I should of course agree."

Here the purchase was made by the Krim and Benjamin group controlling United Artists Corporation of 700,000 shares of the outstanding 1,700,000 shares of A. A. P. stock from the Chesler group. This huge block constitutes working control of A. A. P. and makes of Krim and Benjamin the dominant or controlling group of stockholders as defined by Douglas, J., in *Pepper v. Lytton*,

308 U. S. 295, 306, and *Southern Pacific Co. v. Bogert*, 250 U. S. 483, 492 (see Louis Loss—Securities Regulation p. 458, Determinants of Control). Even Mr. Seymour M. Peyser states that "United Artists began its negotiations looking toward the acquisition of A. A. P. shares *or its underlying assets* • • •". The underlying assets would of course be the "Popeye" and Warner Bros. film library, both of which constituted its main and underlying assets. Evidently it proved more practical and to the financial advantage of the sellers to have a tax free sale of corporate stock effected in Toronto, Canada, where the stock transfer agent of defendant A. A. P. is located. Consequently the sale of shares was consummated in Toronto rather than the sale of the underlying physical assets.

b.) The purchase by Attorneys Krim and Benjamin through their subsidiary, United Artists, is champertous and against public policy and the consummation of the purchase should be enjoined by this Court.

Under the subheading Origin and History of Champerty and Maintenance, 11 Corpus Juris, 234, the general rule is stated as follows:

> "[§6] A. *Existence under Roman Law.* By the Roman Law it was a species of *crimen falsi* to enter into any confederacy or to do any act to support another's lawsuit, by money, witnesses, or patronage.
>
> [§7] B. *Early English Doctrine* 1. *At Common Law.* According to the better doctrine, the various statutes enacted in England concerning champerty and maintenance were in substance merely declaratory of the common law, the fundamental principles of the law on this subject being well established prior to the statutes. The offense has always been considered as one against public justice, and as having a manifest tendency to oppression and the

general purpose of the law against champerty and maintenance was to prevent officious intermeddlers from stirring up strife and contention by vexatious and speculative litigation which could disturb the peace of society, lead to corrupt practices, and prevent the remedial process of the law. *The power of influential persons to whom rights of action were transferred in order to obtain their support and favor in suits brought to assert those rights was the cause of the rigid doctrine of the early common law.* (Italics supplied.)

"[§8] 2. *In Equity.* The court of chancery in the main followed the courts of law in treating champerty and maintenance in all its forms as illegal and went further in some respects, giving relief against, and refusing to enforce, transactions not strictly involving champerty or maintenance, but savoring of it."

One of the earliest but leading cases showing the exercise by a Court of Equity of its injunctive powers to restrain the enforcement by an attorney or his nominee of an assignment of a right of action purchased by the attorney, is the case of *Arden v. Patterson* (New York Chancery Reports 5, Johnsons Chancery Reports page 44) in which the opinion was written by Chancellor Kent.

c.) Plaintiff is an aggrieved party and has standing to seek and enforce the injunctive relief sought by these proceedings.

In the prayer for relief under the first cause of action contained in the amended complaint, plaintiff seeks an injunction, against the commercial exploitation of the Popeye characters contained in the 119 Popeye cartoons made by the Fleischer Studios, Inc., or Fleischer Studios Incorporated, an accounting of profits and a decree requiring the defendants Paramount Pictures, Inc., and Paramount Pictures Corporation to repossess and de-

fendants, A. A. P., Inc., and Associated Artists Productions, Inc., and any of their agents, servants, employees, successors and assigns to deliver up and surrender to the Court or to an agent to be appointed by the Court, all negatives and positives of the "New Cartoons" including the Twelve Popeye cartoons * * *."

It is not denied that Phillips & Nizer were the attorneys who drew the basic agreement between King Features Syndicate, Inc., and the Fleischer Corporation as attorneys for the plaintiff, the construction of which agreement will in great measure be determinative of the rights of the parties (see concession of Louis Phillips as follows: "It may very well be true that 25 years ago, in 1932, Phillips & Nizer represented Max Fleischer in negotiating the license agreement between King Features Syndicate and the Fleischer Corp." [rec. 421]).

Arthur Krim, then a member of the firm of Phillips and Nizer, in the years 1938 to 1940 inclusive was the attorney who handled the litigation between Joseph Kallus and Fleischer Studios, Inc. (see *Kallus v. Fleischer*, 225 App. Div. 812) which involved a claim for $120,000 commensurate with the royalties paid by the Fleischer to King Features Syndicate. In said suit confidential disclosures were made to Krim as to all contracts with, royalties paid to and negotiations with King Features Syndicate and such confidential information are the basis of the preferred position of Krim and Benjamin in making their purchase from A. A. P. (see Dave Fleischer app. pp. 31a-37a).

Plaintiff should not be required to litigate with his own former attorneys as litigants in a field where the confidential relationship is fraught not only with the possibility but with the actuality of fraud, overreaching and undue advantage taken of the client by his former attorneys.

For the foregoing reasons this petition for a writ of certiorari should be granted.

GUSTAVE B. GARFIELD,
Attorney for the Petitioner Dave Fleischer,
122 East 42nd Street,
New York 17, N. Y.

April, 1959.

Opinion of United States Court of Appeals for the Second Circuit.

No. 58—October Term, 1958.

(Argued January 6, 1959 Decision February 20, 1959.)

Docket No. 25152

DAVE FLEISCHER, individually and as Trustee in dissolution of Fleischer Studios, Incorporated,
Plaintiff-Appellant,

v.

LOUIS PHILLIPS, *et al.* (Phillips, Nizer, Benjamin & Krim),
Respondents-Appellees.

Before:

CLARK, Chief Judge.
MOORE, Circuit Judge, and GIBSON, District Judge.

Appeals from the United States District Court for the Southern District of New York, William B. Herlands and Edmund L. Palmieri, Judges.

Plaintiff appeals from orders denying motions to disqualify respondents as counsel for several defendants in a pending action and for injunctive relief. Appeals dismissed.

Gustave B. Garfield, New York City, for plaintiff-appellant.

Seymour Shainswit, of Phillips, Nizer, Benjamin, Krim & Ballon, New York City, for appellee Louis Phillips.

Simon H. Rifkind, of Paul, Weiss, Rifkind, Wharton & Garrison, New York City (Edward N. Costikyan, of Paul, Weiss, Rifkind, Wharton & Garrison, New York City, on the brief), for appellees Robert S. Benjamin and Arthur B. Krim.

Daniel Huttenbrauck, of Mendes & Mount, New York City, for appellees A. A. P., Inc., and Associated Artists Productions, Inc.

CLARK, Chief Judge:

These are appeals from orders which deny plaintiff relief sought against respondents, defense attorneys in his pending action against Paramount Pictures, Inc., and other motion picture producers and distributors. Though respondents have not raised the issue, we must first decide whether the orders are appealable and give us jurisdiction for review. In substance the primary relief sought in each motion was the disqualification of the firm of Phillips, Nizer, Benjamin & Krim, which has represented defendants Paramount Pictures, Inc., Paramount Pictures Corporation, and Flamingo Films, Inc. Before Judge Herlands plaintiff contended that Louis Phillips of that firm had formerly represented plaintiff in matters relevant to this litigation, and sought an order barring the firm from the action and enjoining it from representing defendants while disqualified. The motion before Judge Palmieri was in form an application solely for an injunction *pendente lite*; disqualification was not requested. But the basis of the motion—that members of the law firm had allegedly acquired and were intending to acquire an interest in the subject matter of the action in violation of Canon 10 of the Code of Legal Ethics—was one which if substantiated most certainly would have resulted in counsel's disqualification; and the injunctive relief requested—that an allegedly champertous transaction be undone and the con-

summation of another prevented—is as collateral to the basic thrust of the motion as the incidental injunctive relief sought before Judge Herlands. The real and only bite to each motion is the attempt to secure the exclusion of the lawyers from the case; and once disqualification is obtained, all else is superfluous. Hence the prayers for injunctive relief add nothing to the orders denying the motions and render neither of them automatically appealable under 28 U. S. C. §1292(1). *Federal Glass Co. v. Loshin*, 2 Cir., 223 F. 2d 100, 101. See also *Morgenstern Chemical Co. v. Schering Corp.*, 3 Cir., 181 F. 2d 160; *Albert v. School Dist. of Pittsburgh*, 3 Cir., 181 F. 2d 690, 691; *American Airlines v. Forman*, 3 Cir., 204 F. 2d 230; *District 65, Distributive, Processing and Office Workers Union of New York and New Jersey v. McKague*, 3 Cir., 216 F. 2d 153; *Wallace Products v. Falco Products*, 3 Cir., 242 F. 2d 958; *Division 689, etc., v. Capital Transit Co.*, D. C. Cir., 227 F. 2d 19; 6 Moore's Federal Practice 49-51 (2d Ed. 1953).

Accordingly, these appeals can be justified only if the orders are within the class made appealable by *Cohen v. Beneficial Indus. Loan Corp.*, 337 U. S. 541, 546. But surely this dreary and acrimonious proceeding, which has so overwhelmed the substance of this litigation that we are not told and are uncertain what the action is all about, does not arise from orders within "that small class which finally determine[s] claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." Indeed, the motion before Judge Palmieri involves no claim of right by plaintiff. The allegedly champertous transactions made the basis of that application caused no direct injury to plaintiff; plaintiff's status on that motion seems to be comparable to that of any citizen or officer of the court calling to the attention

of the court a possible instance of misconduct occurring before it. And Judge Herlands' decision that no connection had been shown between Phillips' representation of plaintiff in the distant past and the issues involved in this litigation, though most thorough and persuasive, seems merely a procedural step, not of final character, and subject to reconsideration or change as new facts may develop. As pointed out in the *Cohen* case, 337 U. S. 541, 546, the very purpose of the "final" decision requirement of 28 U. S. C. §1291 "is to disallow appeal from any decision which is tentative, informal or incomplete."

In *Harmar Drive-In Theatre v. Warner Bros. Pictures*, 2 Cir., 239 F. 2d 555, rehearing denied 2 Cir., 241 F. 2d 937, certiorari denied 355 U. S. 824, a divided court held that, since an order disqualifying an attorney had elements of collateral finality, there should be no distinction in an order refusing to disqualify. But surely that does not follow, for the finality of the two orders is as dissimilar as their results. An order granting disqualification seriously disrupts the progress of the litigation and decisively sullies the reputation of the affected attorney; but one refusing such relief merely allows the action to proceed and has no permanent effect of any kind. Here, as with a motion to dismiss an action or to grant summary judgment, while the affirmative grant of the requested relief is final and appealable, a mere refusal to act is necessarily less conclusive and ought not to be reviewed by this court. The ill effect of the *Harmar* ruling, which has presumably led to this wasteful appeal where the original issues are altogether lost, is even better demonstrated by that very case itself; the reversal there of the district court's orders led to lengthy delay in the progress of the litigation and ultimately to dismissal for failure to prosecute. Although we did recently reverse this dismissal as improvident, *Colonial Drive-In Theatre v. Warner Bros. Pictures*, 2 Cir., Jan. 26,

1959, the years spent in getting that case under way again ought not often to be repeated.

In this circuit in the past, powerful voices have been heard in support of interlocutory appeals and the continuing surveillance of trial court judges implicit therein. But research of a committee of the Judicial Conference of the United States, headed by the late great Judge Parker, disclosed that a majority of the federal judges were opposed to such a change and felt that the function of appeal was review, rather than trial supervision; and so the Conference limited its recommendations of new appellate jurisdiction to narrowly confined areas where both reviewed and reviewing judges felt that ultimate adjudication would be materially advanced. 28 U. S. C. §1292(b), effective Sept. 2, 1958. In the light of this experience and this enactment, the desirability of maintaining the settled federal principle against piecemeal appeals seems manifest. This is the position of a majority of the present active circuit judges shown in various rulings usually on motions which have not seemed to call for extensive opinion writing.[1] Hence upon principle and upon these more recent authorities we are constrained to hold the present orders not final for the purpose of appeal.

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[1] A late unreported decision of this character is that granting the motion to dismiss the appeal in *Echelman v. Grusmark*, 2 Cir., Dec. 12, 1958, rehearing denied Jan. 15, 1959, per Clark, Hincks, and Lumbard, JJ. The case illustrates the judicial view against expanding existing statutory grants of interlocutory appeals in specified instances—here that of orders in receivership proceedings, certain of which have been appealable under 28 U. S. C. §1292(a) (2). Other cases refusing to extend appealability in this area include *Garden Homes, Inc. v. United States*, 1 Cir., 200 F. 2d 299, 300; *United States v. Otley*, 9 Cir., 116 F. 2d 958; *Cookery v. Roberts & Mander Corp.*, 3 Cir., 189 F. 2d 234; *Skirvin v. Mesta*, 10 Cir., 141 F. 2d 668; *Grand Beach Co. v Gardner*, 6 Cir., 34 F. 2d 836; *Guardian Trust Co. v. Shedd*, 8 Cir., 240 F 2d 689. Reliance upon *Collins v. Miller*, D. C. Cir., 198 F. 2d 948, as being *contra* is not justified; under the unusual probate administration of the District of Columbia an action to remove an administrator must necessarily be instituted in the federal court and refusal of the remedy decisively terminates the proceeding.

Even though the case thus cannot be accepted on the merits, we have necessarily had to explore them to reach our conclusion; and because conduct of members of the bar has been so severely questioned, we note our concurrence with the conclusions of the two district judges that respondents have done nothing improper. The strictures are unjustified and unworthy.

Appeals dismissed.

GIBSON, District Judge (concurring):

I concur fully in Judge Clark's opinion dismissing these appeals. As a trial judge, I desire to point out that to follow the reasoning of the dissenting opinion will inevitably cause untold harm to one of the purposes causing the adoption of the Civil Rules of Federal Procedure. Rule #1, in part, says: "They shall be construed to secure the just, speedy and inexpensive determination of every action." The cause of just, speedy and inexpensive justice will be set far, far back if one construes these rules to enlarge the practice of piecemeal appeals. If one party can challenge the propriety of the other party's attorney—and such an order is held appealable, then that litigation must necessarily be delayed until this side question is passed on by the Appellate Court. The Trial Court is perfectly able to pass on any such question—and if required, can require new counsel to take over. The underlying philosophy of the minority opinion is to reinstate piecemeal appeals—that practice which still so dogs and delays and renders litigation expensive in many State Courts.

MOORE, Circuit Judge (dissenting):

In my opinion the order of Judge Herlands is appealable and should be affirmed. As a result of the denial of plaintiff's motion to disqualify the law firm of Phillips, Nizer, Benjamin & Krim from appearing as attorneys for the defendants the case will have to proceed to trial on the merits against the various defendants, represented by the same attorneys who had represented plaintiff in various matters. If such representation may be a violation of the canons of ethics so as to taint the entire proceeding this possibility should be tested at the threshold. The disqualification question is wholly collateral to the issues in the litigation and should not be mingled with matters which will be resolved only in a final judgment on the merits. Orderly and expeditious trial procedure would scarcely be achieved were a lengthy trial to be held which might be reversed on appeal were it determined that defendants' attorneys should have been disqualified. The time spent in seeking an adjudication on the merits would thus have been wasted because of an error unrelated to the issues of the case. This court in *Harmar Drive-In Theatre v. Warner Bros. Pictures*, 2 Cir., 1956, 239 F. 2d 555, rehearing denied 2 Cir., 1957, 241 F. 2d 937, cert. den. 355 U. S. 824 (1957), held that an order disqualifying an attorney had elements of collateral finality and hence was "within the class of orders described in *Cohen v. Beneficial Indus. Loan Corp.*, 337 U. S. 541, 546." The majority were of the "opinion that with respect to appealability no distinction exists between orders granting disqualification and those refusing to do so" (p. 556). Accordingly the court concluded that the order was appealable.

The illustration used by the majority to demonstrate the difference between granting and denying a motion for summary judgment is inapposite. The granting of a motion for summary judgment terminates the action with finality,

whereas the denial reserves final decision for the trial. Issues collateral to the litigation are not being tested on such motions.

The philosophy of appealability expressed by the Supreme Court in the *Cohen* case, *supra*, is most applicable here. A comparison of the issues involved in the main litigation and those in this proceeding now on appeal illustrates how unrelated they are. An adjudication of the right of this law firm to remain as the attorneys for the defendants will not "make any step toward final disposition of the merits of the case and will not be merged in final judgment." The determination by the District Court on this motion resulted in the final disposition of a right "which is not an ingredient of the cause of action and does not require consideration with it" (*Cohen, supra*, pp. 546-547).

Here plaintiff is suing various corporations and an individual for wrongs allegedly perpetrated upon him by them. The disqualification of the attorneys selected by the defendants is wholly collateral to the issues in that case. Useful analogy is to be found in a proceeding to remove administrators. Were the administrators not removed the administratiton of the estate would have continued under their supervision. If this were improper it would have been "too late effectively to review the order" on final distribution of the estate (*Collins v. Miller*, D. C. Cir., 1952, 198 F. 2d 948, 950). The order dismissing the petition for removal was held appealable. So here the question of disqualification of defendants' attorneys can be decided upon facts which are not necessary or relevant to the issues upon which the final judgment must ultimately rest.

As to the merits of the motion to disqualify, the district court carefully and ably reviewed the facts. His conclusion that "[p]laintiff has failed to sustain his burden of proof of establishing a prima facie basis for said motion" is sound. Affirmance should dispose now and for always of

this highly collateral controversy. Mere dismissal of the appeal will permit this issue to remain alive only to be reactivated upon a possible future appeal in which the mingling of these diverse issues will create confusion. Consideration should also be given to the practical situation with which some future trial judge will be confronted in ruling on questions of admissible evidence. Plaintiff has had his day (even many days) in court on the merits of disqualification. He has lost on the merits and properly so in my opinion. If there be merit to the principal litigation it should be pursued and disposed of without further delay.

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JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958.

No. 825

DAVE FLEISCHER, Individually and as Trustee in dissolution of FLEISCHER STUDIOS, INCORPORATED, a Florida corporation,

Petitioner,

against

PARAMOUNT PICTURES, INC., PARAMOUNT PICTURES CORPORATION and FLAMINGO FILMS, INC.,

Defendants-Respondents,

and

A. A. P. INC., ASSOCIATED ARTISTS PRODUCTIONS, INC., U. M. & M. T. V. CORP., WPIX, INC., DUMONT BROADCASTING CORPORATION, KING FEATURES SYNDICATE, INC., FLEISCHER STUDIOS, INCORPORATED, a New York corporation, MAX FLEISCHER, individually and as co-trustee with plaintiff of FLEISCHER STUDIOS, INCORPORATED, a Florida corporation,

Defendants,

and

ROBERT S. BENJAMIN and ARTHUR B. KRIM,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS BENJAMIN AND KRIM IN OPPOSITION.

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WILLIAM B. MALLIN,
Of Counsel.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 825

DAVE FLEISCHER, Individually and as Trustee in dissolution of FLEISCHER STUDIOS, INCORPORATED, a Florida corporation, Petitioner,

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A. A. P. INC., ASSOCIATED ARTISTS PRODUCTIONS, INC., U. M. & M. T. V. CORP., WPIX, INC., DUMONT BROADCASTING CORPORATION, KING FEATURES SYNDICATE, INC., FLEISCHER STUDIOS, INCORPORATED, a New York corporation, MAX FLEISCHER, individually and as co-trustee with plaintiff of FLEISCHER STUDIOS, INCORPORATED, a Florida corporation, Defendants,

and

ROBERT S. BENJAMIN AND ARTHUR B. KRIM, Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS BENJAMIN AND KRIM IN OPPOSITION.

The "Questions Presented" by Petitioner.

Petitioner seeks certiorari to review the judgment of the United States Court of Appeals for the Second Circuit which dismissed an appeal from an order of the United

States District Court for the Southern District of New York (Palmieri, J.). Judge Palmieri's order denied a motion by Petitioner for a temporary and permanent injunction to restrain an already consummated $8,400,000 stock transaction (20a-23a,* 146). Questions 1, 5 and 6 apparently relate to that order.

In the same opinion in which the Court of Appeals dismissed the appeal from Judge Palmieri's order, it dismissed an appeal from a separate and distinct order made by Judge Herlands, which arose out of the same litigation. Questions 2, 3 and 4 apparently relate to that order.

This brief, on behalf of respondents Benjamin and Krim (who are not parties to the action below), is submitted in opposition to so much of the petition as seeks review of Judge Palmieri's order, i.e., questions 1, 5 and 6. The remaining questions are discussed in the brief submitted by Louis Nizer, Esq.

Lurking in the background of this case is the question of whether Judge Palmieri's order was appealable. But since the Court of Appeals said that his decision was correct on the merits, the question of appealability is of academic interest only.

Statement.

Petitioner brought an action in the Southern District Court of New York against Paramount Pictures, Inc., Associated Artists Productions, Inc. (hereinafter "AAP"), and others. Although it is difficult to glean from the amended complaint (which is not part of the record) exactly

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* Unless otherwise indicated, references are to pages in the appendices submitted on the appeal from Judge Palmieri's order to the Court of Appeals, which are part of the record in this Court; numbers followed by the letter "a" refer to appellant's appendix (blue); numbers followed by the letter "b" refer to appellees' appendix (white).

what this action purports to be about, it is apparently essentially an action for alleged breach of contract between a dissolved corporation in which Petitioner was a stockholder and one of the Paramount defendants (7b-10b, 31b-33b). Part of the subject matter of that contract was 119 Popeye cartoons (14b, 19b, 20b).

This action (hereinafter "the main action") is still pending in the pleading stage in the District Court. Neither the appeal to the Court of Appeals nor the instant petition for certiorari involves the merits of the main action.

On December 17, 1957, while the main action was pending, Gotham Television Film Corporation (hereinafter "Gotham") (not a party to the main action) and a subsidiary of United Artists Corporation (not a party to the main action) purchased from twelve individuals (not parties to the main action) 700,000 shares of AAP stock, which was approximately 41% of the outstanding stock of AAP (20a-21a). Negotiations for the purchase of AAP stock by United Artists were actually begun in August, 1957, prior to the time the main action was commenced (20a).

Thereafter Petitioner made a motion in the main action which in form demanded an injunction against this consummated purchase and sale of AAP stock. In order to show some relationship between the main action, the stock transaction and the 119 Popeye cartoons, Petitioner pointed to the following combination of circumstances:

(a) Paramount Pictures, Inc., Paramount Pictures Corporation and Flamingo Films, Inc. are defendants in the main action.

(b) They are represented by the firm of Phillips, Nizer, Benjamin, Krim & Ballon (21a).

(c) Robert S. Benjamin and Arthur B. Krim are partners in the Phillips, Nizer firm (21a).

(d) Messrs. Benjamin, Krim and another partner, Seymour M. Peyser, together own approximately 30% of the stock of United Artists which has about 3,000 shareholders (14b).

(e) Gotham, the purchaser of the AAP stock, is a subsidiary of United Artists (20a, 14b).

(g) The stock which Gotham has purchased from twelve of the stockholders of AAP represents approximately 41% of the stock in that corporation (20a).

(h) AAP owns, among many other things, the 119 Popeye cartoons (14b), in which, in this action, Petitioner claims he has some sort of an interest.

On this basis Petitioner asserted that the proposed transaction constituted a violation of Canon 10 of the Canons of Professional Ethics, which provides:

> "10. Acquiring Interest in Litigation.
>
> "The lawyer should not purchase any interest in the subject matter of the litigation which he is conducting." DRINKER, LEGAL ETHICS, p. 312 (1953).

Judge Palmieri's Order.

In the order denying Petitioner's motion, Judge Palmieri made, *inter alia*, the following findings of fact:

> 1. "Neither Robert S. Benjamin [nor] Arthur B. Krim . . . has acquired any stock interest in A. A. P. . . ." (21a);
>
> 2. "The A. A. P. stock acquired by Gotham is not part of the subject matter of the instant lawsuit." (21a);
>
> 3. "Plaintiff has made no sufficient showing . . . that he is aggrieved by any such alleged violation . . .

or even that he has in any way been affected or prejudiced by Gotham's acquisition from twelve stockholders of A. A. P. of their minority stock interest in A. A. P." (21a, 22a); and

4. "Plaintiff has made no sufficient showing of any irreparable injury to plaintiff . . ." (22a).

On these facts, Judge Palmieri concluded that Canon 10 had not been violated and that in any event, Petitioner had no standing to attack the transaction.

From this order Petitioner appealed to the Court of Appeals for the Second Circuit.

Decision of the Court of Appeals.

The Court of Appeals dismissed this interlocutory appeal (Pet. pp. 37-42). The majority opinion of Chief Judge Clark, concurred in by District Judge Gibson, held:

1. The basic thrust of the motion before Judge Palmieri was to exclude attorneys from the main action, with the prayer to restrain the stock transaction being merely incidental (Pet. pp. 38-39); and

2. So viewed, Judge Palmieri's order does not fall into the class of collaterally final orders made appealable by *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541 (1949) (Pet. pp. 39-41).

Circuit Judge Moore dissented from the majority's holding that the order was not appealable, and voted to affirm on the ground that Judge Palmieri's order was correct (Pet. pp. 43-45).

Judges Clark and Gibson likewise said that Judge Palmieri was correct on the merits (Pet. p. 42), so that all three judges, regardless of the question of appealability, found the orders appealed from correct on the merits.

Reasons for Denying the Writ.

Petitioner asks this Court to review an order, now moot, rejecting on the basis of comprehensive findings of fact his frivolous challenge to a stock transaction which he has no standing to attack in the first place. To grant this review, this Court would have to ignore its settled practice of refusing to review evidence to pass upon the correctness of findings of fact, and to undertake this task on the basis of an unintelligible record, composed chiefly of incompetent evidence.

Moreover, none of the accepted grounds for granting certiorari is present here. Regardless of appealability, both courts below have unanimously found no merit in Petitioner's contentions on the merits. The decision below does not conflict with any decision of another circuit or of this Court, nor does it raise a single issue of importance. In short, Petitioner would have this Court expend its limited time in resolving insignificant questions, contrived out of thin air, to accomplish no purpose except perhaps to satisfy Petitioner's curiosity.

I.

Questions 5 and 6 propounded by Petitioner are not raised or supported by the record.

Judge Palmieri found that Messrs. Benjamin and Krim purchased no AAP stock, that the AAP stock purchased by Gotham is not the subject matter of the main action and that Petitioner has no standing to attack this stock transaction because he is not affected thereby.

It follows that questions 5 and 6 are simply not raised or supported by this record. Both questions assume that

such a purchase by Messrs. Benjamin and Krim occurred, and Judge Palmieri found the opposite. Moreover, these questions ask this Court, in the guise of presenting a question of law, to review the findings of fact of two courts below that Petitioner is not injured by the stock transaction and therefore has no standing to raise the questions. Finally, the questions call for a determination whether the AAP stock purchased by Gotham is "the subject matter of this action" within the meaning of Canon 10. Since Petitioner has not deigned to include in his record his complaint or amended complaint, it is difficult to see how that question could be resolved.

II.

Petitioner has no standing in this Court.

The record is clear that Petitioner claims no interest in the AAP stock as such. It is not the subject matter of the main action; the twelve AAP shareholders, Gotham, and United Artists are not parties to the main action. So far as Petitioner is concerned, it is totally irrelevant who owns this stock. Indeed, in the three courts before which this case has come, Petitioner has as yet made no suggestion whatsoever as to how the disposition of this stock has harmed him, or how it could possibly harm him.

As a result, in the District Court, Judge Palmieri correctly found that:

> "Plaintiff has made no sufficient showing • • • that he is aggrieved by any such alleged violation • • • that he has any standing to seek, individually, enforcement of Canon 10 of the Canons of Professional Ethics • • • or even that he has in any way been affected or prejudiced by Gotham's acquisition

> from twelve stockholders of A. A. P. of their minority stock interest in A. A. P." (21a-22a).

And Chief Judge Clark in the majority opinion for the Court of Appeals said:

> "Indeed, the motion before Judge Palmieri involves no claim or right by plaintiff. The allegedly champertous transactions made the basis of that application caused no direct injury to plaintiff; plaintiff's status on that motion seems to be comparable to that of any citizen or officer of the court calling to the attention of the court a possible instance of misconduct occurring before it" (Pet. pp. 39-40).

The law is clear in these circumstances that this Court will not pass upon the questions presented, since its decision will have no effect on the complaining party. E.g., *Tileston* v. *Ullman*, 318 U. S. 44 (1943); *Doremus* v. *Board of Education of the Borough of Hawthorne*, 342 U. S. 429 (1952). The manifest applicability of this principle to the case at bar requires the denial of certiorari.

III.

The order which Petitioner seeks to review on certiorari is moot.

The status of the 700,000 shares of AAP stock, involved in the transaction here claimed to have violated Canon 10, has radically changed since Judge Palmieri's order.

On October 17, 1958, pursuant to agreement of August 8, 1958, as amended September 15, 1958, Gotham transferred title to this stock to United Artists Associates, Inc. (hereinafter "UAA"). On October 17, 1958 UAA in turn transferred 2,000,000 shares of AAP stock, including the

700,000 shares here involved, to AAP in exchange for the bulk of AAP's assets. (Affidavit of Edward N. Costikyan, sworn to March 25, 1959, p. 5 which was submitted in this Court on Petitioner's motion for a stay.)

Finally, on October 31, 1958, AAP filed a Certificate of Reduction of Capital retiring the entire 2,000,000 AAP shares. *Ibid.* As a result, the AAP stock involved in the transaction here complained of no longer exists.

It follows that Petitioner is asking this Court to pass upon facts that have no real meaning and on which a decision could have no effect. A review of Judge Palmieri's order accordingly presents only moot and abstract issues. And it is beyond the jurisdiction of this Court, as limited by Article III of the Constitution, to pass upon such issues. E. g., *Doremus* v. *Board of Education of the Borough of Hawthorne, supra; Muskrat* v. *United States*, 219 U. S. 346 (1911).

IV.

The "questions presented" by Petitioner would require a review of the evidence to pass upon the correctness of findings of fact concurred in by both courts below, an inappropriate task for this Court.

Judge Palmieri made detailed and comprehensive findings of fact, conclusive upon all aspects of the Canon 10 question, and they are also basic to the questions of Petitioner's standing in this Court and the appealability of Judge Palmieri's order in the Court of Appeals. As long as these findings stand, this order must also stand; as a result, any review of this case must pass upon these findings.

But this Court will not grant certiorari in order to review the correctness of findings of fact or "to review

the evidence or inferences drawn from it." *General Talking Pictures Corp.* v. *Western Electric Co.*, 304 U. S. 175, 178 (1937). This is especially so, where, as here, both courts below have in effect concurred in these findings. *Ibid; Faulkner* v. *Gibbs*, 338 U. S. 267 (1949).

V.

Petitioner has failed to make a record sufficiently complete and intelligible for review by this Court.

Any review of the issues arising out of Judge Palmieri's order would require this Court to examine in detail (1) the nature and form of the stock transaction complained of; (2) the relationship of the stock transaction to the main action; and (3) the relationship of the order to the main action.

Yet Petitioner has not printed the amended complaint which defines the main action. Nor has he printed the instruments passing the title of the AAP stock to Gotham. Instead, Petitioner endeavors to show the details of this complex stock transaction, as well as the contents of the amended complaint, by means of affidavits, largely based on hearsay. A review on this record, especially a review of findings of fact, would be wasteful and unsatisfactory. The absence of an adequate or even an intelligible record is compelling reason for this Court to deny certiorari.

VI.

The petition presents no conflicts between circuits; the overruling of the *Harmar* case does not create the type of "conflict" among lower courts calling for certiorari.

Petitioner does not suggest that there is a conflict between the decision in the case at bar and a decision of another circuit. See Supreme Court Rule 19.

But he does assert that there exists an "intramural controversy among the judges of the United States Court of Appeals, Second Circuit" (Pet., p. 20), based upon the fact that the Court of Appeals in the case at bar overruled *Harmar Drive-In Theatre* v. *Warner Bros. Pictures*, 239 F. 2d 255 (2d Cir. 1956), *cert. denied* 355 U. S. 824 (1957), also decided in the Second Circuit.

But the overruling of the *Harmar* case does not create the type of conflict which should be settled by this Court, for "conflict or inconsistency between decisions of the same Court of Appeals ordinarily is not a ground for the issuance of certiorari since the later in point of time is controlling." ROBERTSON AND KIRKHAM, JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES, §336, p. 668 (2d ed. Wolfson & Kurland 1951); Supreme Court Rule 19. In short, there is no conflict to be settled by this Court. Thus, this Court's special and significant role of insuring uniformity of Federal law throughout the country is not a factor in the instant case. The relationship of this case to the *Harmar* case, accordingly, provides no ground for certiorari.

VII.

The decision below does not conflict with any decision of this Court.

The ruling of the Court of Appeals dismissing the appeal from Judge Palmieri's order does not conflict with this Court's decision in *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541 (1949). While that case held appealable an interlocutory order refusing to require the plaintiff to post security for costs, this Court made clear that the so-called doctrine of collateral finality operates within narrow confines. It said:

> "This decision appears to fall in that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated.
>
> . . . . . .
>
> "But we do not mean that every order fixing security is subject to appeal. Here it is the right to security that presents a serious and unsettled question. If the right were admitted or clear and the order involved only an exercise of discretion as to the amount of security, a matter the statute makes subject to reconsideration from time to time, appealability would present a different question." 337 U. S. 546, 547.

None of the conditions specified by this Court have been met here.

The order here is not final. The order is related to the main action; for, since it involves an alleged purchase of an interest in the main action, it is necessary to determine

what the main action involves. What the main action involves cannot be determined without the amended complaint, which Petitioner has failed to print.

Moreover, there is nothing substantial about the Canon 10 question; Petitioner's assertion of professional misconduct is frivolous. And, as found by Judge Palmieri and held by the Court of Appeals, Petitioner asserts no claim of right here; he merely acts like any member of the public who might point out alleged misconduct to the Court.

VIII.

The petition raises no important questions.

There is, in the first place, no important public interest attached to the outcome of this particular case; as a result, the case at bar in and of itself is not significant from the standpoint of Supreme Court review.

The question of appealability—especially the appealability of an order which both Courts below agreed was correct on the merits—has no general importance or general applicability. For, whether this particular order denied an injunction or refused to disqualify attorneys, and whether it has collateral finality turns on the particular, unique facts of the transaction complained of in relation to the almost incomprehensible main action. This Court has clearly indicated that it will not grant certiorari to consider the specific facts of a case. *General Talking Pictures Corp.* v. *Western Electric Co.*, 304 U. S. 175 (1938); *NLRB* v. *Waterman*, 309 U. S. 206, 208 (1939). Hence, this narrow issue does not warrant the attention of this Court.

Further, the past practice of this Court makes it clear that the question of appealability is not important enough

to merit granting certiorari, absent a conflict of the type calling for review. For example, the *Cohen* case, which came to this Court by certiorari, is the leading case on the doctrine of collateral finality. Yet when this same issue of appealability was first presented to this Court in a petition for certiorari in *Donovan* v. *Queensboro Corporation*, 335 U. S. 804 (1948), certiorari was denied. The only difference between the *Cohen* and *Donovan* cases, so far as certiorari is concerned, was that at the time of the petition in the *Cohen* case a conflict had occurred between the decisions of the Second Circuit in *Donovan* and the Third Circuit in *Cohen*. See ROBERTSON & KIRKHAM, JURISDICTION OF SUPREME COURT, §322, p. 631. (Wolfson & Kurland 1951) Moreover, in *Harmar Drive-In Theatre* v. *Warner Bros. Pictures*, 239 F. 2d 255 (2d Cir. 1956); *cert. denied* 355 U. S. 824 (1957), where one of the issues was the appealability of an order refusing to disqualify attorneys, this Court denied certiorari.

We submit that the *Cohen*, *Donovan* and *Harmar* cases demonstrate that the issue of appealability of an interlocutory order is not important enough to warrant certiorari, absent a conflict between circuits or with this Court.

Finally, the question of the alleged violation of Canon 10 is not an issue of general importance or general applicability. Both the issues of whether Messrs. Benjamin and Krim purchased the AAP stock in question and whether such stock represents a speculation in litigation relate solely to the particular, unique facts of the case at bar.

Moreover, the American Bar Association opinions already construing Canon 10, e.g., Nos. 176, 246 and 279, as well as the face of Canon 10, make it clear that the assertion of professional misconduct here is frivolous; accordingly, it cannot present a significant question.

Conclusion.

The petition for a writ of certiorari to review Judge Palmieri's order should be denied.

Respectfully submitted,

SIMON H. RIFKIND,
Attorney for Respondents Benjamin and Krim.

EDWARD N. COSTIKYAN,
WILLIAM B. MALLIN,
Of Counsel.

Dated: New York, N. Y.
May 6, 1959

FILE COPY

Office-Supreme Court, U.S.
FILED
MAY 12 1959
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 825

DAVE FLEISCHER, individually and as Trustee in dissolution of FLEISCHER STUDIOS, INCORPORATED, a Florida corporation,

Petitioner,

against

PARAMOUNT PICTURES, INC., PARAMOUNT PICTURES CORPORATION and FLAMINGO FILMS, INC.,

Defendants-Respondents,

and

A.A.P., INC., ASSOCIATED ARTISTS PRODUCTIONS, INC., U. M. & M. T. V. CORP., WPIX, INC., DUMONT BROADCASTING CORPORATION, KING FEATURES SYNDICATE, INC., FLEISCHER STUDIOS, INCORPORATED, a New York corporation, MAX FLEISCHER, individually and as co-trustee with plaintiff of FLEISCHER STUDIOS, INCORPORATED, a Florida corporation,

Defendants,

and

ROBERT S. BENJAMIN and ARTHUR B. KRIM,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

STATEMENT OF A.A.P., INC. AND ASSOCIATED ARTISTS PRODUCTIONS, INC., IN OPPOSITION TO PETITION FOR CERTIORARI

FRANK A. BULL,
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

DAVE FLEISCHER, individually and as Trustee in dissolution of FLEISCHER STUDIOS, INCORPORATED, a Florida corporation,

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ROBERT S. BENJAMIN and ARTHUR B. KRIM,

Respondents.

No. 825

STATEMENT OF A.A.P., INC. AND ASSOCIATED ARTISTS PRODUCTIONS, INC., IN OPPOSITION TO PETITION FOR CERTIORARI

A.A.P., Inc. and Associated Artists Productions, Inc. are only indirectly concerned with the matters involved in the petition for certiorari,—vexatious and acrimonious motions wholly collateral to any issues involved in the pending

action. However, we have read the petition for certiorari, as well as the briefs to be filed by the other parties; and we fully subscribe to the position of the other defendants and respondents as disclosed by the briefs. We find no merit in the petitioner's motions and can ascribe to the motive behind them only an apparent desire to harass and inveigh unjustly against other attorneys, to the detriment of the matters actually involved in the pending action.

It may not be of any importance that we consider the principal action to be spite litigation, but it would seem evident that the collateral motions are part of a spite campaign. The unwarranted attack by petitioner's attorney on opposing attorneys would be ludicrous were it not for the fact that it can only result in serious delay and needless expense to all parties, including those which we represent. The litigation has been pending for nearly a year and a half without being at issue, and issue being made impossible by the tactics of petitioner's attorney in making collateral attacks on other attorneys.

This is litigation commenced by petitioner in which the wheels of justice are grinding very slowly because of petitioner forcing a feud with other attorneys. In that respect we are interested and involved. The scandalous charges made by petitioner's attorney against other reputable and highly regarded attorneys do not involve us or any of the parties to the principal action, but they do affect all defendants in delaying the proper administration of justice.

There is only one issue involved in this application for certiorari, i.e., whether the two District Court decisions were appealable. If they were not, we are all back to where we were months ago when these decisions were rendered. If they were appealable, the only possible result would be their affirmance by a higher court. We respectfully suggest that a stop should be put to petitioner's attorney's nonsense and the real issues in the action allowed to be litigated.

CONCLUSION.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

FRANK A. BULL,
DANIEL HUTTENBRAUCK,
Attorneys for A.A.P., Inc., and
Associated Artists Productions, Inc.

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Respondents.

DEFENDANTS-RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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DEFENDANTS-RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

Petitioner's Spurious "Questions Presented"

In the teeth of the rebukes by District Judges William B. Herlands and Edmund L. Palmieri, and by the Court of Appeals (per Chief Judge Charles E. Clark, Circuit Judge Leonard P. Moore and District Judge Ernest W.

Gibson), petitioner is continuing his "dreary and acrimonious" assault upon the integrity of respondents' counsel (to quote Chief Judge Clark, Petition p. 39). Ignoring the condemnation by the Court of Appeals of his strictures as "unjustified and unworthy" (*id.*, p. 42), and the 16 months in court already afforded petitioner on the merits of disqualification, petitioner has manufactured six "questions presented" (pp. 4-5), each premised upon a distortion of the actual record, and each wholly academic, for however the question were to be resolved, petitioner would still have lost on the merits of disqualification.

We shall not dwell upon Questions "1", "5" and "6", since they will be dealt with fully in the brief of former Judge Rifkind as counsel for the respondents involved in the proceedings initiated by petitioner before District Judge Palmieri while his motion to disqualify was pending before Judge Herlands. We note merely: In petitioner's latest assault, he sought a sweeping mandatory injunction rescinding a multi-million dollar stock purchase transaction between parties in no way involved in this litigation and having nothing to do with any conceivable subject matter of the instant lawsuit. The findings by Judge Palmieri (Blue Appendix to Appellant's Brief below, pp. 20a to 22a) spotlighted the impropriety of petitioner's tactics and, accordingly, equally illumine the branch of petitioner's vendetta against our firm involved in the disqualification proceedings. Judge Palmieri explicitly found that the Canons of Ethics had nothing to do with the challenged transaction, no canon was violated, petitioner was not even aggrieved, nor did he have any standing, individually, to police the bar, and to "unfairly and improperly, and without any benefit to plaintiff in the prosecution of his instant action, besmirch the reputation and impair the professional standing and livelihood of two honorable attorneys". (The quotation is from Finding 13; also Findings, 4, 7 to 12, inclusive of Blue Appendix to Appellant's Brief, pp. 21a-22a). Chief Judge Clark, in his

opinion dismissing the appeal from Judge Palmieri's decision, likewise stressed: "Indeed, the motion before Judge Palmieri involves no claim of right by plaintiff. The allegedly champertous transactions made the basis of that application caused no direct injury to plaintiff;" (Petition, p. 39).

Petitioner's Question 2 (Petition, p. 4) is wholly academic. Though the Court of Appeals disagreed on the question of appealability, nowhere in the 36-page Petition has room been found to disclose that all three judges below were in unanimous agreement that petitioner's strictures are unjustified and unworthy. Thus, Chief Judge Clark, speaking also for Judge Gibson, after referring to Judge Herlands' "most thorough and persuasive decision" (Petition, p. 40), expressly emphasized at the close of his opinion:

> "Even though the case thus cannot be accepted on the merits, we have necessarily had to explore them to reach our conclusion; and because conduct of members of the bar has been so severely questioned, we note our concurrence with the conclusions of the two district judges that respondents have done nothing improper. *The strictures are unjustified and unworthy.*" (Petition, p. 42; emphasis ours.)

Judge Moore, dissenting because he considered Judge Herlands' decision appealable, expressly stated that the decision should be affirmed. In this connection, Judge Moore said:

> "As to the merits of the motion to disqualify, the district court carefully and ably reviewed the facts. • • • Plaintiff has had his day (even many days) in court on the merits of disqualification. He has lost on the merits and properly so in my opinion. If there be merit to the principal litigation it should be pursued and disposed of without further delay."

In short, petitioner's academic grievance under Question 2 is that the Court should have unanimously affirmed

Judge Herlands' comprehensive 60-page decision (163 F. Supp. 548), instead of dismissing the appeal. But the result would have been the same: judicial condemnation of the unlawyerlike pattern of behavior of petitioner's counsel in manufacturing unjustified and unworthy strictures against respondents' attorneys.

Petitioner's Question 2 also falsely hypothesizes a "substantial relationship" between the present controversy and our firm's sporadic representation of a former Fleischer corporation *21* and *26* years ago—the ancient vintage of this prior representation is slighted in the Petition—in the teeth of Judge Herlands' detailed demonstration, approved by all three judges of the Court of Appeals, that these ancient matters had absolutely no relationship whatsoever to any issue in this case. Indeed, petitioner has suppressed virtually *in toto* Judge Herlands' scholarly 60-page decision for the obvious reasons that: (1) with painstaking analysis, Judge Herlands had meticulously rejected on the merits each lurid charge hurled by petitioner and his counsel;* (2) for page after page, the Judge had reviewed some of petitioner's counsel's devious maneuvers throughout this litigation (*e.g.*, 163 F. Supp. at 561-62, 565, 569); and (3) upon his comprehensive analysis of the entire record, Judge Herlands had concluded *inter alia* (*id*, p. 569):

> "*Plaintiff is unreliable and incredible as a witness so far as concerns his cross-motion.* Plaintiff has failed to sustain his burden of proof of establishing a prima facie basis for said motion.
>
> • • •
>
> "This time sequence casts a shadow upon the credibility and good faith of plaintiff in making this cross-motion to disqualify. *The Court is of the*

* In 7 affidavits and approximately 40 exhibits we fully documented petitioner's fabrications and irrelevancies (our White Appendix to Appellees' Brief, pp. 3 to 129, incl.). The instant Petition utterly ignores this mountain of documentation despite the space and emphasis devoted thereto in Judge Herlands' decision (163 F. Supp., e.g., at 557, 565-69).

clear opinion that the second cause of action of the amended complaint was added in an effort to truss up the previously made motion." (Italics ours.)

As we have already observed, all three judges below praised Judge Herlands for his comprehensive decision, and expressly registered their distaste with petitioner's shabby maneuvers.

Petitioner's Question 3 is specious. Judge Herlands' decision (163 F. Supp. 548) is the best refutation of petitioner's false premise that Judge Herlands tried "the merits of the case in chief"—by exposing petitioner's manifest bad faith, his unreliability and incredibility, and his utter failure to establish even a prima facie basis for his vitriolic attack (163 F. Supp. at 569).*

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* This Court's 5-4 opinion in *Smith* v. *Sperling*, 354 U. S. 91 (Petition, p. 23), is indeed remote authority to support petitioner's spurious Question 3. *Smith* was a derivative stockholder's suit based on alleged fraudulent waste of the assets of the corporation. The issue was whether the corporation should be realigned as a party plaintiff. A majority of this Court ruled that for purposes of federal diversity jurisdiction, alignment of parties is property determinable on the face of the pleadings and by the nature of the controversy. Since "it is plain that the stockholder and those who manage the corporation are completely and irrevocably opposed on a matter of corporate practice and policy" (354 U. S. at 98), the Court held that the corporation is to be treated as a party defendant. The irrelevancy of *Smith* to the case at bar requires no elaboration.

Nor is there truth to petitioner's statement that respondents have moved for judgment of dismissal on the merits based on Judge Herlands' decision (Petition, p. 24). The actual facts: We moved to dismiss the jumbled, unintelligible amended complaint for violating the requirements of Rules 8(a)(2) and 8(e)(1) of the Federal Rules, and alternatively to strike the scandalous allegations sprinkled therein. In our notice of motion, we referred to Judge Herlands' decision as *corroborating* the irrelevancy and impertinency of the extraneous scandalous matter. Patently, too, the motion for disqualification having failed, there is no excuse for the continued presence in the amended complaint of the claimed sporadic representations by our firm 21 and 26 years ago so confusingly dredged up by petitioner in his pleading (see e.g., our White Appendix to Appellees' Brief, fols. 91-93, 102, 110-116, 140-155).

Petitioner's Question 4 (Petition, p. 4) is in the realm of fantasy. We shall not burden the Court with repetition of our detailed factual presentation (White Appendix to Appellees' Brief, fols. 23-8, 34-6, 64-6, 105-9, 122-4) refuting all the distortions and fallacies involved in petitioner's continued labored—and confused—argument of "equitable servitude" (Petition, e.g., pp. 24-31) to the effect that an ancient 1932 license agreement with King Features Syndicate, pursuant to which "old" Popeye cartoons were produced, in some mystical fashion erased the pivotal May 24, 1941 contract *—nine years later—whereby the Fleischers, individually and corporate, relinquished all rights in said cartoons, including all characters contained therein or created or used therefor, and, explicitly, any interest in any proceeds arising from any distribution of the "old" Popeye cartoons, either on television or theatrically. Petitioner's statement that his fanciful theory was rejected by Judge Herlands purely because of a "false affidavit of Louis Phil-

* Petitioner's counsel had confessed, in his specification of petitioner's purported claims (our White Appendix to Appellees' Brief, Exh. EE, fols. 277-85), when there was no motive for obfuscation, that the issues herein are matters of law governed by a legal interpretation of the contract of May 24, 1941. In petitioner's moving affidavit on the motion for disqualification—made before all the distortions added in his later affidavit and amended complaint—petitioner again explictily acknowledged that "The issues between Paramount and myself are governed by contract dated as of May 24, 1941 and will be resolved more as a matter of law" (quoted by Judge Herlands in his decision, 163 F. Supp. at 562).

The cardinal fact—abundantly documented (our White Appendix to Appellees' Brief, e.g., Exhibits F, H, I, J, K, L, M, N, pp. 74 to 81) and explicitly underscored by Judge Herlands (163 F. Supp., e.g. at 565)—so thoroughly condemnatory of the motion for disqualification, is that the Fleischers and their corporation were represented with respect to every aspect of the May 24, 1941 transaction by the late N. William Welling, their regular personal attorney since virtually the inception of their corporate enterprise—and not by our law firm, Louis Phillips, nor by any other member or associate thereof. Typically, Mr. Welling's name was conspicuously omitted from every affidavit filed by petitioner and his counsel (see Yellow Appendix to Appellant's Brief, e.g., pp. 29a-41a, 83a-112a).

lips" (Petition, p. 25) is nonsensical. His theory was exploded by the very provisions of the May 24, 1941 contract —see, e.g., the Fleischers' explicit acknowledgment that after May 24, 1941, Paramount "shall have no further obligation after said date to make any payments whatsoever" to the Fleischers, whether as "advance payments, down payments or percentage or share of receipts, or otherwise" (our White Appendix to Appellees' Brief, fols. 34-6).

In this connection, the Petition (pp. 28-31) itself has quoted Judge Herlands' decisive answer to what he characterized as petitioner's obscure "novel interpretation of the May 24, 1941 contract" (163 F. Supp. at 557). Judge Herlands' scholarly analysis of this pivotal agreement was praised by all three judges of the Court of Appeals.*

Petitioner's reliance (p. 25 et seq.) upon *In re Waterson, Berlin & Snyder Co.* v. *Irving Trust Co.*, 48 F. 2d 704, is misplaced. There, the Court held that upon a music publisher's bankruptcy, the trustee in bankruptcy may sell the copyrighted songs, subject to the right of the composers to have them worked in their behalf and to be paid royalties *according to the terms of the contracts.* Plainly, this holding gives the petitioner no comfort whatsoever because, according to the very terms of the May 24, 1941 contract, the Fleischer corporation had surrendered *all* rights in the old cartoons, including specifically the characters created or used therefor and all royalties of any nature; consequently, the Fleischers have no interest which may effect the "equitable servitude" with which the instant petition is interlarded.

Corrected Statement of the Question Presented.

In the light of the actual record, the true question is: Where the petitioner has already had 16 months in court

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* Chief Judge Clark, speaking also for Judge Gibson, referred to Judge Herlands' analysis as "most thorough and persuasive" (Petition, p. 40). Judge Moore similarly stated that Judge Herlands "carefully and ably reviewed the facts" (*id.*, p. 44).

on motions for disqualification, and the district judges with precise reasoning rejected every accusation hurled by petitioner and his counsel, and the Court of Appeals, although dividing on the question of appealability, were unanimous in rebuking the petitioner and his counsel for making their unworthy motions for disqualification, is the question of appealability of the orders denying disqualification of such overriding importance as to warrant review by this Court, notwithstanding that the question herein is wholly academic, for however resolved, petitioner would still have lost on the merits of disqualification?

The petition is significant more for its omissions than its contents.

Confusion is the petitioner's stock in trade. The purported "Statement" (pp. 11-19) repeats, in a jumbled and almost incoherent fashion, the misstatements on which the petitioner constructed his vicious attack against respondents' counsel, while the overwhelming evidence to the contrary is completely ignored. Petitioner proceeds as if the mere naked allegations in his affidavits may be substituted for the many months of searching analysis by Judge Herlands of the entire record.

Nowhere does the petition mention:

(1) the actual nature of petitioner's jumbled 30-page pleading, studded with what Judge Herlands euphemistically called "lurid" accusations against our law firm (163 F. Supp. at 561).* Even with the benefit of the voluminous affidavits filed by petitioner and his counsel (Yellow Appen-

* E.g., see the petitioner's false charges in the amended complaint that Flamingo Films, Inc., is a funnel through which our law firm is "siphoning off" for its personal profit, petitioner's assets and properties (our White Appendix to Appellees' Brief, fols. 1-3). Petitioner, in his Appendix below, sedulously omitted these charges because they illustrate the degree to which he manufactured utterly unfounded accusations. The falsity of the charges was incontrovertibly demonstrated (our White Appendix to Appellees' Brief, fols. 195-203).

dix to Appellant's Brief, *e.g.*, pp. 28a-41a, 84a-112a), Judge Herlands found "the threads of plaintiff's argument" difficult to weave into even "a coherent thesis" (163 F. Supp. 560; also p. 557). Chief Judge Clark also noted: "[W]e are not told and are uncertain what the action is all about" (Petition, p. 39). The instant petition, which merely repeats virtually *haec verba* fragments of petitioner's affidavits, as a comparison with his Appendix below discloses, is no more intelligible;

(2) the actual nature of Judge Herlands' comprehensive 60-page decision which, point by point, exposed the hollowness of each lurid accusation fabricated against our law firm, primarily because the firm *21 and 26* years ago had sporadically represented a former Fleischer corporation in matters having absolutely no relationship whatsoever to the present controversy;

(3) the condemnation by the Court of Appeals (per Chief Judge Clark) of petitioner's and his counsel's strictures as "unjustified and unworthy" * (Petition, p. 42);

---

* It is noteworthy that when petitioner's counsel, Gustave B. Garfield, applied to Mr. Justice Harlan for a stay of our pending motions to strike the scandalous pleading, which stay was denied, petitioner's counsel, characteristically, contended that our construction of Chief Judge Clark's opinion as criticizing his behavior in this case, was "a figment of a sick mind" (please see page 1 of rebuttal affidavit of Mr. Garfield, sworn to March 25, 1959, submitted to Mr. Justice Harlan). Upon the argument on April 13, 1959, of our motions before District Judge Palmieri, when the Judge expressed a similar interpretation of the opinion of the Court of Appeals, particularly in the perspective of Rule 11 of the Federal Rules of Civil Procedure, Mr. Garfield filed an affidavit, purportedly under 28 U. S. C. § 144, accusing the Judge of bias and prejudice. Judge Palmieri subsequently rejected Mr. Garfield's attack upon his integrity. It appears to be a routine procedure for Mr. Garfield to attack judges who dare to disagree with him. See Mr. Garfield's specious charges of bias and prejudice against [now Chief] Judge Sylvester J. Ryan of the District Court for the Southern District of New York, founded on Mr. Garfield's wildest conjecture—likewise rejected by the Court of Appeals in *Plotkin v. National Comics Publications, Inc., et al.*, 217 F. 2d 332, 333 (C. A. 2, 1954).

(4) Mr. Garfield first conceived his accusations against our law firm and launched the spate of abuse on the motion for disqualification because we had refused to submit to his proposal to forfeit our clients' right of priority to take petitioner's deposition (our White Appendix to Appellees' Brief, fols. 378-84, 156-60, 309-12, 357). In short, had we surrendered our right to priority—subsequently upheld by Judge Herlands (*id.*, fols. 388-96)—we would not have been the recipient of the torrent of lurid accusations;

(5) Mr. Garfield's previous frivolous petition in the Court of Appeals for a writ of mandamus against Judge Herlands, on the heels of the Judge's decision denying disqualification, wherein Mr. Garfield resurrected the order of Judge Herlands preserving respondents' priority of examination and haled the Judge into court to defend his routine, discretionary and manifestly correct discovery order (our White Appendix to Appellees' Brief, fols. 388-96). This frivolous petition was unanimously—and summarily—dismissed by the Court of Appeals for the Second Circuit on May 28, 1958;

(6) the amended complaint itself—as pointed out by Judge Herlands—was the product of trickery and shabby maneuvering by petitioner's counsel to "truss up" the pending motion for disqualification with a morass of new, scandalous fabrications (163 F. Supp. at 569);

(7) the battery of lurid and epithetical allegations against our law firm unleashed by petitioner and his counsel on the motion for disqualification, was but one step in their thoroughgoing pattern of harassment and vilification. See, *e.g.*, Mr. Garfield's other fantastic false charges against members of our firm, which were so decisively rejected by Judge Palmieri and which are dealt with in greater detail in the brief of Judge Rifkind as counsel for the respondents involved therein; and Mr. Garfield's novel motion to punish our senior partner, Louis Phillips, for a non-existent contempt, based solely on Mr. Garfield's fanciful and, as fully demonstrated by the affidavits of every

attorney who had been present, inaccurate version of a colloquy in connection with a mere application for an adjournment of a motion (Record, pp. 197-212)—which motion was thereupon withdrawn by Mr. Garfield (Yellow Appendix to Appellants' Brief, p. 3a);

(8) it appears, as exemplified by reported cases, to be a standard tactic of Mr. Garfield to move to disqualify his adversaries. We refer, for example, to Mr. Garfield's fantastic—and rejected—motion to disqualify the distinguished firm of Shearman, Sterling & Wright from prosecuting an action, and even seeking a dismissal of the action, upon the sole ground that Shearman and Sterling were dead (*U. S. Technical Research Corp.* v. *Delta Export & Import Corp. et al.*, 201 F. 2d 672, C. A. 2, 1953).

It is against this background of appellant's counsel's vendetta against his adversaries that we supply the corrected statement of the facts.

Corrected Statement of the Facts

The Petition's "Statement" (pp. 11-19), without further characterization, is a distortion of the basic background facts. We supply the actual record, revealing the true nature of the instant litigation—the legal interpretation of the May 24, 1941 agreement between the Fleischers and Paramount, as to which, incontrovertibly, the Fleischers were represented by their regular personal attorney, the late N. William Welling. All of the assorted ancient matters so misleadingly dredged up by the petitioner more than a score of years later, are demonstrably irrelevant.

From 1929 to 1941, pursuant to a series of contracts, Paramount distributed motion picture cartoons produced by a New York corporation called Fleischer Studios, Inc., and its Florida successor in interest similarly called Fleischer Studios, Incorporated. Pursuant to these contracts, Paramount advanced huge sums to the Fleischer corporations, enabling the corporations to pay substantial

salaries to Dave and Max Fleischer and to meet the heavy overhead and other operating expenses of the Fleischer studio. Paramount received a fee for distribution. From the distribution proceeds, Paramount was first to reimburse itself for its advances to the Fleischer corporations, and Paramount and the Fleischer corporations were to share the remainder, if any, according to the certain percentages provided for in the various distribution contracts (our White Appendix to Appellees' Brief, fols. 15-16).

By 1941 it had become apparent that the Fleischer Studios' operation was unsuccessful and in financial straits. Very heavy advances by Paramount were unrecouped. Max and Dave Fleischer were at loggerheads, and their feud was disrupting their operations (*id.*, fols. 17, 189-93). (The personal dispute between the Fleischers has continued to this day, as evidenced by Dave's charges of conspiracy, fraud and misappropriation against Max, personally, in the complaint and amended complaint herein, Record, pp. 2, 9, 11, 20, 141, 155-7, 170.)

Accordingly, on May 24, 1941, in order to avert complete disaster (our White Appendix to Appellees' Brief, fol. 191), Fleischer Studios, Incorporated and Paramount entered into the final agreement. This agreement was an "arms' length" transaction. The Fleischers were represented in every phase of the negotiations and execution of this transaction by the late N. William Welling, their regular personal attorney for many years, whose name was so conspicuously omitted from every affidavit filed by petitioner and his counsel. Paramount was represented by Bernard Goodwin of its legal department (see opinion of Judge Herlands, 163 F. Supp. at 556-7, 560, 562, 565, 567).

Since, as Judge Herlands emphasized, "all rights of plaintiff and the Fleischer interests must be traced to and through this May 24, 1941 agreement" (163 F. Supp. at 556), it merits fuller discussion. These are some of the basic provisions of this pivotal agreement:

(1) "[I]t clearly cancels all prior agreements with the Florida corporation and its predecessors" (163 F. Supp. at 556; our White Appendix, fol. 23; see also fols. 214-9).

(2) "Moreover, by force of the May 24, 1941 contract and a separate bill of sale, all rights to all cartoons produced to that date—including 'all characters contained therein or created or used therefor'—were transferred to Paramount" (163 F. Supp. at 557, our White Appendix, fols. 25-9, 64-5).

(3) By assignment dated December 23, 1941, pursuant to the May 24, 1941 agreement, Fleischer Studios, Incorporated, formally assigned to Paramount all of its rights under its agreements with King Features Syndicate, Inc., the copyright proprietor of "Popeye" (our White Appendix, fols. 41-2).

(4) Outstanding indebtednesses of the Fleischers to Paramount were reduced by many hundreds of thousands of dollars (*id.*, fols. 29-30).

(5) The Fleischer corporation was employed during the one-year period commencing May 24, 1941 to produce 12 "Popeye" cartoons, and a handful of other works, collectively referred to in the agreement as the "New Cartoons". Paramount continued to finance the Fleischers' operations. In connection with these "New Cartoons", Paramount was to receive 40% of the gross distribution proceeds as part of its fee for distribution. From the balance of 60%, Paramount was first to recoup its advances to the Fleischer corporation and thereafte share the proceeds equally with the Fleischer corporation (*id.*, fols. 30-1).

(6) As to these "New Cartoons", Paramount again was vested with full and complete title of the broadest scope, embracing "all parts and other material thereof", including "all characters contained therein or created or used therefor" (*id.*, fols. 32-3).

(7) By separate personal, letter agreement likewise dated May 24, 1941, Max and Dave Fleischer agreed that (a) all of their prior agreements with Paramount were cancelled, (b) after May 24, 1941, Paramount shall have no obligation to make any payments whatsoever to the Fleischers under any such cancelled agreement, whether as advance payments, down payments or percentages or share of receipts, or otherwise, and (c) explicitly reconfirmed the absolute character of Paramount's exclusive ownership in all of the films and related rights referred to in the simultaneously executed basic agreement between Paramount and the Fleischer corporation (*id.*, fols. 34-6).

Subsequent to the employment by Paramount of Fleischer Studios, Incorporated, to produce the said "New Cartoons", there was no improvement in the operations of Fleischer Studios. The war between Max and Dave Fleischer and the removal of the Fleischer Studio to Florida had destroyed the effectiveness of their business (*id.*, fols. 43, 185-93). Paramount was reluctant to finance further the Fleischers' unsuccessful operations. After distribution of the "New Cartoons" in the usual course of business, the very substantial advances to Fleischer Studios, Incorporated, remained—and still are—unrecouped (*id.*, fols. 51, 55-6). The prints and negatives remained in Paramount's vaults for many years, until they were made available for television exhibition.

Although the outstanding license agreements with the copyright proprietor of "Popeye", pursuant to which the "Popeye" cartoons were produced, withheld from the Fleischer corporation and Paramount any right to televise or cause to be televised these cartoons, Paramount realized moneys when King Feature Syndicate, Inc., the copyright proprietor of "Popeye" granted to a third party television rights in these cartoons because Paramount was the copyright owner of the film cartoons and owned the prints and negatives (*id.* fols. 57-62, 66-70). The academic nature of the entire instant litigation is revealed by the controlling

fact that even with the "windfall" of additional moneys realized through the deals relating to television, the indebtedness of the Fleischer corporation to Paramount still subsists, to a huge extent (*id. fols.* 51, 55-56).

Paramount's employment of the Fleischer corporation ceased on May 23, 1942—17 years ago. These intervening years are filled with documented acts indicating time and again that the accusations of skullduggery and fraud, so many years subsequently, leveled against our firm on the motion for disqualification, are specious afterthoughts for ulterior motives (we respectfully refer the Court to Judge Herlands' succinct summary of some of this significant evidence—as adduced in our opposition papers, 163 F. Supp. at 566-69).

On October 14, 1957, petitioner served his jumbled original complaint which defies any attempt at summary. The succeeding year and a half has been consumed by petitioner's "dreary and acrimonious" disqualification gambit, "which has so overwhelmed the substance of this litigation" (quoting from Chief Judge Clark's opinion below, petition, p. 39).

Additional corrections of the petition

As to the *Kallus* case—launched in 1938, 21 years ago (petition, p. 14 *et seq.*): petitioner's prolix erroneous and confusing picture of this wholly irrelevant ancient suit to recover an alleged agent's commission, was fully and meticulously corrected in our opposing papers (our white Appendix to Appellees' Brief, fols. 143-53, 345-51).

As to the license agreement of February 17, 1937, between the Fleischer corporation and King Features Syndicate (Petition, p. 14): Petitioner omits the crucial fact that in the negotiations "the Fleischer interests were represented by the Fleischers' personal attorney, the late N. William Welling • • • and *not* by Mr. Phillips" (opinion of Judge Herlands, 163 F. Supp. 548, at 557, 555; italics by the Judge).

Argument

The Petition, significantly, does not quarrel with Judge Herlands' scholarly exposition of the substantive law governing disqualification (163 F. Supp., at 551-53). Petitioner's sorry performance in failing to show any rational "substantial relationship" between what he himself had admitted to be the current issue, a legal construction of the May 24, 1941 agreement (p. 6, *supra*), and the irrelevant assorted ancient matters going back to 1932 which he so confusingly dredged up, underscored the hollowness of the lurid attack upon our firm. Petitioner richly deserved the rebuke below that his strictures are "unjustified and unworthy" (Petition, p. 42). A wealth of additional authorities corroborated the correctness of the rejection of petitioner's retaliatory cross-motion for disqualification (in addition to the authorities cited by Judge Herlands, 163 F. Supp., at 551-53, see, *e.g.*, *Shaw* v. *Bill*, 95 U. S. 10; *Gelders* v. *Haygood*, 182 Fed. 109 (Cir. Ct., S. D. Ga.); *Clayton* v. *Birdsboro Steel Foundry & Machine Co.*, 66 N. Y. S. 2d 676 (Sup. Ct., N. Y. Co.); *National Finance Co.* v. *Abernathy*, 66 S. W. 2d 358 (Texas Civ. App.); *Ferguson* v. *Alexander*, 122 S. W. 2d 1079 (Texas Civ. App.); *DeLong* v. *Miller*, 133 Cal. App. 2d 175, 283 P. 2d 762; *Gillet* v. *Gillet*, 269 Mich. 364; *Rowe* v. *Dyers*, 213 S. W. 2d 234 (Texas Comm. App.).

One final observation as to the applicable law. As Judge Herlands found (pp. 4-5, *supra*), the amended complaint manifestly was designed "to truss up" petitioner's motion by compounding the irrelevant, ancient representations with a morass of new scandalous attacks upon our firm—apparently upon the fanciful theory seemingly urged in the instant petition (Question 3, p. 4; also pp. 22-4) that the mere pleading of accusations, however unfounded, somehow bolstered petitioner's motion and prevented our firm from defending against the vitriolic assault (in this connection, see, for example, the demonstrably false, lurid

allegations that our firm is "siphoning off" for its personal profit, petitioner's assets and properties, p. 8, *supra* and fols. 1-3 of our White Appendix to Appellees' Brief).

Goodson v. *Smith*, 243 P. 2d 163 (Supreme Court of Wyoming), supplies appropriate additional condemnation of petitioner's misconception of the applicable law (p. 165):

> "This court would hardly be justified in saying that an attorney at law thus accused is helpless and defenseless and should be compelled to take a neutral attitude in such a situation, without resorting to every reasonable means to defend his honor and his integrity."

In our case, we submit, where concededly our firm and Louis Phillips did not represent Dave Fleischer, Max Fleischer or Fleischer Studios, Incorporated, on any aspect of the subject matter of this litigation, the May 24, 1941 agreement, and concededly our firm and Louis Phillips were never consulted by any Fleischer, individual or corporate, on any matter throughout the subsequent sixteen and one-half years, there is abundant justification for the holding that our firm and Louis Phillips are not disqualified to resist the baseless, irrelevant accusations leveled against them in petitioner's pleading.

Indeed, although petitioner invokes Canon 37 (Petition, p. 7), he deletes therefrom the following explicit provision:

> "If a lawyer is accused by his client, he is not precluded from disclosing the truth in respect to the accusation."

We further submit that the Petition's reference to an alleged "intramural controversy among the judges of the United States Court of Appeals, Second Circuit" as to the appealability of an order denying disqualification (Petition, p. 20, *et seq.*) is scant justification for the review sought by this Court, in the light of the actual opinions below, wherein both the majority and the dissenting judge were in unanimous agreement that petitioner's strictures against

our firm are unjustified and unworthy (*supra*, pp. 3-4). Petitioner's preoccupation, accordingly, with the issue of appealability is wholly academic. However this question were resolved, petitioner would still have lost on the merits of disqualification. Petitioner can scarcely be serious in urging that he is aggrieved because the lower court dismissed his appeals instead of unanimously affirming the decisions of the district judges.

Moreover, we submit, certiorari to this Court is not the proper remedy to resolve an alleged "intramural controversy" in one circuit. Petitioner could have requested a rehearing *en banc* by the Court of Appeals for the Second Circuit, within 15 days from the filing of the opinion below (Rule 25a of the Rules of the United States Court of Appeals for the Second Circuit). Petitioner filed no such petition for rehearing because, we believe, he realized that on the actual record any panel would have reached the same result: judicial condemnation of petitioner's and his counsel's scandalous assault upon respondents' attorneys.

CONCLUSION

The petition is singularly devoid of merit. Petitioner's "dreary and acrimonious" assault upon the integrity of respondents' counsel (to again quote Chief Judge Clark below, Petition p. 39) should be halted by the denial of a writ of certiorari.

Dated: April 30, 1959.

Respectfully submitted,

LOUIS NIZER,
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SEYMOUR SHAINSWIT,
of Counsel.